Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

LARRY R. FAULKNER, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF TEXAS AT AUSTIN; ET AL.,

Petitioners,

v.

ROBERT BRISTER, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can university property, presumptively a nonpublic forum and declared nonpublic by the university, be deemed a public forum solely because it lies next to and looks similar to an acknowledged public forum?

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PETITION FOR WRIT OF CERTIORARI

The Fifth Circuit erroneously held that an entryway on University of Texas property adjoining a public sidewalk was a public forum for purposes of the exercise of First Amendment rights. The court's decision places it in irreconcilable conflict with U.S. Supreme Court and circuit court decisions regarding what is the proper test for whether property is a public forum. The Court should grant this petition to resolve this important, unsettled question of federal constitutional law.

CITATION OF FIFTH CIRCUIT COURT OF APPEALS'S OPINION

Brister v. Faulkner, 214 F.3d 675 (CA5 2000).

BASIS FOR JURISDICTION

The Fifth Circuit delivered its judgment and opinion in *Brister* on June 28, 2000. This Court has jurisdiction to entertain this petition for writ of certiorari under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. CONST. amend. I.

STATEMENT OF THE CASE

Respondents, Robert Brister, William Medaille, and others distributed leaflets on the grounds of the University of Texas at Austin before a private, on-campus event at the Frank Erwin Special Events Center. After receiving numerous complaints that the leafleters were interfering with the arrival of guests at the Erwin Center's Red River Street entrance, the police asked the leafleters to move off university property and onto the nearby public sidewalk, where they could continue their leafleting. Respondents contend that the university violated their First Amendment rights by asking them to move.

A. Description of the Property

The Erwin Center is a large, circular, indoor amphitheater. The building and its surrounding grounds lie entirely on university property. Its director is a university employee. The Erwin Center is used for official activities, such as meetings or commencement exercises, and for sport and student group events. In addition, the Erwin Center may contract with non-university groups for other events. App., at B-6.

University of Texas rules reserve university facilities such as the Erwin Center for university programs and activities. When authorizing the establishment of special event centers such as the Erwin Center, the university Board of Regents expressly declared: "Designation as a Special Use Facility shall not constitute the facility a public facility or forum that is open to use by individuals, groups, associations, or corporations on a first come, first served basis." The Regents also provided that "[t]he property, buildings, and facilities owned or controlled by the U.T. System or component institutions are not open for assembly, speech, or other activities as are the public streets, sidewalks, and parks." Under university rules, persons who are not students, faculty, or staff of the university are not permitted to distribute literature—including

leaflets or fliers—on university property. Persons who violate this rule are first warned and then may be arrested for trespass.

Public streets border the Erwin Center: Martin Luther King, Jr. Boulevard on the north, Fifteenth Street on the south, Interstate Highway 35 on the east, and Red River Street on the west. A paved walkway, consisting of gravel with small brown stones and laid out in large square panels, covers the west side of the Erwin Center grounds, stretching from the Erwin Center building to Red River street. This same kind of paving extends all around the Erwin Center grounds—north, south, east, and west. The width of the paved walkway on the Red River side varies. Starting to the south along Red River Street, the walkway is at its widest and forms a large open area, approximately 130 feet wide between Red River Street and the building. At this point a 70-foot-wide stairwell descends from the Center's south entrance to the walkway. Heading north along Red River street, the walkway narrows to approximately 30 feet in width as Red River Street curves in toward the building. At the north end of the walkway, a large 70-foot-wide pedestrian ramp descends from the Center's north entrance to the walkway. See attached maps, App., at C-1.

Between the north entry ramp and the south entry stairwell is the west or Red River entrance to the Erwin Center, which faces Red River street. It is at street level and forms an alcove cut into the Erwin Center building. The paved walkway extends into this alcove and up to the Red River entranceway doors. On one side of the alcove are ticket windows, and overhead is the awning formed by the Erwin Center building.

Directly in front of the Red River entrance is a recessed parking area cut from the street into the paved walkway, which serves as short-term parking for ticket purchasers and buses delivering patrons to the Center. The curb from the street curves inward around the recessed parking area and then back out to the street.

Running along Red River Street on the Erwin Center's paved walkway, the city owns a 9-to-12-foot-wide easement extending from the street curb that serves as the public sidewalk. This easement area is paved with the same gravel with brown stones that covers the rest of the Erwin Center grounds. In contrast, the standard city sidewalk in Austin is six feet wide, and, as the district court noted, "the paved area in front of the Erwin Center is not indistinguishable from any other public sidewalk. . . . Generally, a public sidewalk is a smooth, grayish cement." App., at B-10.

The city's easement continues uniformly along the gravel paved area by Red River Street, except for the spot where the city has cut into the paved area to create the short-term parking spaces. There, the easement continues over the parking area and reenters the paved area on the other side. At the recessed parking area, the university's property extends all the way to the curb.

B. Events at Issue

On the evening of January 19, 1996, Respondents arrived at the Erwin Center to leaflet. Respondents are members of the Austin Greens, a political party. Standing in the Red River entranceway to the Erwin Center, Respondents sought to distribute leaflets to guests invited to the Erwin Center for the evening. The guests were delegates to the National Issues Convention who were attending a reception hosted by the Austin Chamber of Commerce. App., at B-2

The delegates to the Issues Convention approached the Red River door. Some approached by foot along the walkway, some in buses that pulled into the recessed parking area in front of the Red River entrance. Brister (not a member of the student body, faculty, or staff) passed out leaflets in the Red River entryway, directly in front of the Red River doors. Officer Pascual Marquez, a University police officer for twenty-six years, stood four feet inside the Red River doors maintaining crowd control. Some of the

delegates complained to officer Marquez that the leafleters were getting in their way as they were stepping out of the buses. *Id.*, at B-3.

After receiving three or four complaints, Marquez went outside and found Brister standing directly in front of the doors as people were being unloaded from a bus that had pulled into the recessed parking area. Marquez approached Brister and informed him of the university's policy against non-students distributing leaflets on university property. Brister argued that it was his constitutional right to distribute the leaflets on the Erwin Center walkway because it was a public sidewalk. Marquez informed Brister that the paved area in the alcoved entranceway was owned by the university, whereas the city owned an easement to the south of the parking area and told Brister that he had to remain south of the parking area. Marquez then went back inside the Erwin Center. *Id.*, at B-3.

After receiving more complaints from the delegates, Marquez went outside and saw Brister standing directly under the overhang in front of the Red River doors. Again, Marquez informed Brister that he was on university property and asked Brister to move south of the parking area. Brister continued arguing with Marquez and challenging his authority. Marquez threatened to arrest Brister if he continued to leaflet on university property. After returning to his post inside the Erwin Center, Marquez continued to receive complaints about Brister. When Marquez came out of the Erwin Center a third time, Brister was standing within two feet of the Red River doors. Marquez grabbed Brister by the arm and walked him away from the doors, out of the way of the entering delegates. During this time, some of the leafleters were displaying a banner and standing to the south of the parking area, and Brister rejoined that group. *Id.*, at B-3.

Plaintiff Medaille, a student, also attempted to distribute leaflets. Medaille was approached by a university police officer (not

Marquez) and was told that he could not distribute leaflets on the walkway. Medaille identified himself as a University of Texas student, but the officer informed him that he could not distribute the leaflets on university property because they did not contain his name or the name of a student organization as required by university rules. Medaille eventually began leafleting to the south of the parking area. Brister and Medaille were the only leafleters approached by a police officer. No police officer disturbed the individuals holding the banner to the south of the parking area. *Id.*, at B-4.

Respondents brought suit, claiming that their First Amendment rights had been violated and that the university regulation prohibiting leafleting on university property was overbroad on its face and as applied to the respondents. The district court held that the university had not infringed respondents' First Amendment rights. App., at B-11. The court found that respondents were blocking the patrons' access to the Erwin Center, and therefore the university was justified in requiring the respondents to move from the entryway. *Id.* The district court, however, entered a declaratory judgment that the university's ban against the distribution of literature by non-students is unconstitutional as applied to the paved walkway in front of the Erwin Center because that property is a "traditional public forum." App., at B-16. The Fifth Circuit affirmed. App., at A-10. Relying on *United States v. Grace*, 461 U.S. 171 (1983), the court held that the paved area by Red River Street is a public forum because it is adjacent to and looks similar to the public sidewalk, an acknowledged public forum. App., at A-7-9.

SUMMARY OF ARGUMENT

In holding that a section of University of Texas property was a traditional public forum, the Fifth Circuit committed an error that implicates an important and unsettled question of First Amendment

law, placing the Fifth Circuit in conflict with controlling Supreme Court precedent and other federal circuits. The Fifth Circuit improperly held that the alcoved entranceway to the Erwin Center, which was specifically designed and built solely to provide unimpeded ingress to and egress from the Erwin Center, is a public forum simply because it was close to and looked similar to a city sidewalk without making the required inquiry into the purpose and traditional use of that property.

ARGUMENT

I. THE FIFTH CIRCUIT'S DECISION IMPLICATES AN IMPORTANT AND UNSETTLED QUESTION REGARDING THE APPLICATION OF *UNITED STATES V. GRACE* AND *UNITED STATES V. KOKINDA*.

The Fifth Circuit held that the paved area along Red River Street is a public forum because it erroneously believed that simply being next to and appearing similar to an acknowledged public forum is sufficient to render public an otherwise nonpublic forum. In other words, the court held that the university property at issue is a public forum solely by association. In so holding, the court ignored *United States v. Kokinda*, 497 U.S. 720 (1991) (plurality opinion), and *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992), which require that courts inquire into the purpose served by the property in question and the traditional use of that property before deeming that property a public forum. In *Brister*, the Fifth Circuit did not discuss the purpose served by the Erwin Center's paved grounds or their traditional use and has placed itself irreconcilably in conflict with other federal courts of appeal, which require an analysis of purpose and traditional use. *Compare Brister v. Faulkner*, 214 F.3d 675 (CA5 2000) *and Community for Creative Non-Violence v. Turner*, 893 F.2d 1387 (CADC 1990), *with Hawkins v. City & County of Denver*, 170 F.3d 1281 (CA10 1999); *Chicago Acorn, SEIU v. Metropolitan Pier & Exposition Auth.*, 150 F.3d 695 (CA7 1998); *Sentinel Comm. Co.*

v. Watts, 936 F.2d 1189 (CA11 1991); *Jacobsen v. Bonine*, 123 F.3d 1272 (CA9 1997) *Freedom from Religion Found. v. City of Marshfield*, 203 F. 3d 487 (CA7 2000); *Warren v. Fairfax County*, 196 F. 3d 186 (CA4 1999).

A. *Kokinda* and *Lee* Are Contrary to the Fifth Circuit's Analysis.

United States v. Kokinda requires a determination of the purpose served by the property at issue before that property can be deemed a public forum. In *Kokinda*, the Court held that a sidewalk in front of a post office was a nonpublic forum. The plaintiffs in *Kokinda*, a political advocacy group, set up a table and chairs on a sidewalk near the entrance to a U.S. Post Office to solicit contributions and distribute literature. They were asked to leave, refused, and were convicted of violating 39 C.F.R. §232.1(h)(1), which prohibits solicitation on postal premises. The plaintiffs contended that §232.1(h)(1) violated the First Amendment.

Kokinda held that public sidewalks are not automatically public forums. *Kokinda*, 497 U.S., at 728-29. Rather, "the location *and purpose* of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum." *Id.* (emphasis added). Instead of discussing the purpose served by the paved entrance to the Erwin Center, the Fifth Circuit focused solely on whether the Erwin Center's paved entryway looked similar to the nearby public sidewalk. Finding that the sidewalk and the entryway looked the same, the court held that the university's paved entryway was a public forum. *Kokinda*, however, rejects this analysis and instead requires a discussion of the purpose served by the property:

> "Respondents contend that although the sidewalk is on Postal Service property, because it is not distinguishable from the municipal sidewalk across the parking lot from the post office's entrance, it must be a traditional public forum and therefore subject to strict scrutiny. This argument is

> unpersuasive. The mere physical characteristics of the property cannot dictate forum analysis." *Id.*, at 727 (emphasis added).

Focusing on purpose, *Kokinda* held that "[t]he postal sidewalk at issue does not have the characteristics of public sidewalks traditionally open to expressive activity." *Id.*, at 727. The Court noted that the sidewalk lay entirely on post office property and that it was the sole means of entering the post office. The Court compared the post office sidewalk to the public sidewalk and noted that the public sidewalk was a public thoroughfare, while the post office sidewalk ran from the parking lot to the front door of the post office. The Court explained that unlike a city street, which is

> "continually open, often uncongested, and constitute[s] not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people [can] enjoy the open air or the company of friends and neighbors in a relaxed environment, the postal sidewalk [is] constructed solely to provide for the passage of individuals engaged in postal business." *Id.*, at 727 (citations omitted).

In short, the postal sidewalk was not constructed "to facilitate the daily commerce and life of the neighborhood or city" like a city street. *Id.* No Postal regulation opened the grounds to First Amendment activity; indeed the Postal Service had expressly limited public expression to just one form: the posting of public notices on designated bulletin boards. *Id.*, at 730. Because the post office sidewalk served a different, more limited purpose than the city sidewalk, the Court held that it was not a traditional public forum. *Id.*, at 727–28.

The Court applied the same analysis of purpose and traditional use in *Lee* and held that airport terminals are not public forums. The plaintiff in *Lee* was a not-for-profit religious corporation whose members distribute religious literature and solicit funds in public

places to support their movement. The owner of airport terminals in the New York area adopted a regulation prohibiting the repetitive solicitation of money or distribution of literature in the terminals. The plaintiff sought a declaratory judgment, alleging that the regulation violated its member's First Amendment rights.

The Court stated, "a traditional public forum is property that has as a principle purpose the free exchange of ideas." *Lee*, 505 U.S., at 679 (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985)). Focusing on purpose and traditional use, the Court noted that airports are built and managed with the goal of promoting efficient travel and that nearly all who visit do so for a travel-related purpose. *Id.*, at 682. Airports are commercial establishments designed to make a profit, and they must provide services attractive to the marketplace. *Id.* Furthermore, airport terminals have never been dedicated to the type of religious expression sought by the plaintiffs. *Id.* The Court held that "it cannot fairly be said that an airport terminal has as a principal purpose promoting 'the free exchange of ideas.'" *Id.* "Thus, we think that neither by *tradition* nor *purpose* can the terminals be described as satisfying the standards we have previously set out for identifying a public forum." *Id.*, at 683 (emphasis added).

B. *Grace* Does Not Support the Fifth Circuit's Decision.

The Fifth Circuit is the only court to interpret *Grace* to stand for a proposition that *Grace* rejects. In *Grace*, the issue was whether the sidewalk in front of the U.S. Supreme Court building was a public forum. The plaintiffs in *Grace* leafleted and displayed a sign while standing on the public sidewalk in front of the U. S. Supreme Court. A federal statute prohibited the public display of any banner or other device that would bring into the public view any party, organization, or movement in the Supreme Court

building or on its grounds. Police warned the plaintiffs that their actions were prohibited and that they would be arrested if they continued. The plaintiffs sued, claiming that the federal statute was unconstitutional. The Court held that the statute was unconstitutional as applied to the public sidewalk. The Court held that sidewalks have traditionally been open to the public for expression and can be considered generally, without further inquiry, to be a public forum. *Grace*, 461 U.S., at 179. The Court also noted that the sidewalks in front of the Supreme Court were indistinguishable from any other sidewalks in Washington, D.C., and there was no physical indication to a person stepping onto the Supreme Court sidewalk that it would be treated differently from other sidewalks in the area. *Id.*, at 179-83. The Court, however, expressly refused to rule whether the Supreme Court grounds and building inside the sidewalk were a public or nonpublic forum. *Id.*, at 178-79.

In contrast, relying on *Grace* as authority, the Fifth Circuit compared the public sidewalk to the university grounds inside the public sidewalk, found that they looked the same, and on that basis declared the university grounds to be a public forum. Although sidewalks are presumptively public fora, *Grace*, 461 U.S., at 179, university grounds typically are not. *See Widmar v. Vincent*, 454 U.S. 263, 268 n.5 (1981) ("A university differs in significant respects from public forums such as streets or parks . . . ."); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988); *Embry v. Lewis*, 215 F.3d 884, 888 (CA8 2000); *Souders v. Lucero*, 196 F.3d 1040, 1044 (CA9 1999). Instead of comparing sidewalk to sidewalk like *Grace* (or in other words, presumptive public forum property to presumptive public forum), the Fifth Circuit has compared sidewalk to university grounds (presumptive public forum to presumptively nonpublic forum) and on that basis held the presumptively nonpublic university property to be a public forum. This is precisely the leap this Court refused to make when it

declined to find the Supreme Court's grounds inside the sidewalk to be a public forum.

Grace rejects the idea that the status of a forum can be transformed simply by the forum characteristics of neighboring property. "Traditional Public Forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression." *Id.*, at 180. The D.C. Circuit agrees that "[t]he mere fact that a sidewalk abuts property dedicated to purposes other than free speech is not enough to strip it of public forum status." *Henderson v. Lujan*, 964 F.2d 1179, 1182 (CADC 1992). The converse should also be true.

In addition, like *Kokinda* and *Lee*, but unlike the Fifth Circuit, *Grace* does not hold that the Court sidewalk is a public forum without discussing the traditional use of that property. *Grace* notes that "[the Court's] sidewalks are used by the public like other public sidewalks." *Id.*, at 183. Finding that sidewalks are traditionally open to the public for expressive activities, the Court held that the sidewalk was a public forum. *Id.*, at 179.

Even if the Fifth Circuit's comparison of public sidewalk to university property is proper in light of *Grace*, the Fifth Circuit used the wrong unit of analysis in making the comparison. In *Grace*, the Court compared the sidewalk in front of the Supreme Court to the "other public sidewalks in the city" and held that they looked the same, creating a notice problem for users of the Supreme Court's sidewalk, *Grace*, 461 U.S., at 179–83. In *Brister*, the Fifth Circuit compared the Erwin Center grounds in front of the Red River entrance to the sections of Austin sidewalk immediately to the north and south of the Red River entrance. Had the court compared the Erwin Center grounds to other sidewalks around the City of Austin, the court might well have concluded that there was no notice

problem. Austin sidewalks are typically 6 feet wide, and the district court noted that sidewalks are generally paved with smooth, grey cement, while the walkway at the Erwin Center is paved with gravel and brown stones laid out in large square panels and is readily distinguishable from the typical Austin sidewalk. App., at B-10. Unlike a normal sidewalk, the paved walkway at the Erwin Center varies in width from 130 feet to 30 feet. App., at C-1. These differences should be clear notice to any would-be leafleter that he is not on a normal city sidewalk and that the rules for traditional city sidewalks and traditional public forums may not apply.

C. The Federal Circuits Are Split on the Proper Interpretation of *Kokinda* and *Grace*.

The Fifth Circuit has split from other federal circuits on the proper test for determining whether property is a public forum. Where there is a nearby, acknowledged public forum, the Fifth Circuit asks only whether the property in question is physically distinguishable from the public forum and whether someone exercising First Amendment rights would have notice that the property in question is a special enclave, separate from the nearby public forum. *Brister*, 214 F.3d, at 682–83; *accord Community for Creative Non-Violence v. Turner*, 893 F.2d 1387 (CADC 1990). The Fifth Circuit, however, ignores the purpose and traditional use of the property in question.

Other circuits, whether ultimately concluding that a forum is public or nonpublic, follow the Supreme Court's lead in *Kokinda* and look beyond mere physical characteristics to examine the property's purpose and traditional use. *Sentinel Communications Co. v. Watts*, 936 F.2d 1189 (CA11 1991), held that the perimeter walkways of an interstate rest area were not a traditional public forum despite their proximity to the public highway.

> "Indeed, as modern phenomena, rest areas have never existed independently of the Interstate System, they are

> optional appendages that are intended, as part of the System, to facilitate safe and efficient travel by motorists along the system's highways. At the outset, then, it seems clear to us that rest areas are non-traditional fora." *Id.*, at 1203.

The Ninth Circuit similarly has held that "the mere physical characteristics of the property do not dictate forum analysis. Rather, it is the location and purpose of the property and the government's subjective intent in having the property built and maintained, that is crucial to determining the nature of the property for forum analysis." *Jacobsen v. Bonine*, 123 F.3d 1272, 1274 (CA9 1997). In a case very similar to this one, the Tenth Circuit held that the Galleria area in Denver is not a public forum. *Hawkins v. City & County of Denver*, 170 F.3d 1281, 1287 (CA10 1999). The Galleria was a city street that was closed to cars and made into an open-air pedestrian walkway that is bounded by performing arts complexes and city streets. The musicians union, whose members played in the nearby performance halls, brought suit because they were prohibited from picketing in the Galleria. The court held that the Galleria was not a public forum because its primary function was to permit ingress and egress to and from the nearby performing arts centers, and it was not primarily used as part of the Denver transportation grid as a throughway to other destinations. *See also Chicago Acorn, SEIU v. Metropolitan Pier & Exposition Auth.*, 150 F.3d 695, 702 (CA7 1998) (concluding that Chicago's Navy Pier meeting and convention areas not public fora based on the history of the facility's use); *Freedom From Religion Found. v. City of Marshfield*, 203 F.3d 487, 494 (CA7 2000) ("Whether a property has historically been used for public expression plays an important role in determining if the property will be considered a public forum."); *Warren v. Fairfax County*, 196 F.3d 186, 194 (CA4 1999) ("The Center Island mall has the objective use and purpose of open public access and its use is

eminently compatible with expressive activity; and it is part of a class of property which by history and tradition has been open and used for expressive activity.").

D. Under *Kokinda*, the University Property Is a Nonpublic Forum

Had the Fifth Circuit properly taken into account the purpose and traditional use of the Erwin Center's paved walkway as required by *Kokinda* and *Lee*, the Fifth Circuit would have come to a different conclusion. The Erwin Center is a large, indoor amphitheater that between 1993 and 1997 seated three million people. App., at B-6. The obvious purpose of the Erwin Center's paved walkways is to facilitate the movement of large numbers of people in and out of the Erwin Center. Every architectural detail of the Erwin Center and its grounds bespeaks this purpose. The Erwin Center has numerous entrances and is surrounded by wide, paved walkways. On the Red River side, the walkway covers, at its widest, a 130-foot expanse between the building and the street. A 70-foot-wide stairway and ramp descend from the Erwin Center to the north and south ends of the Red River walkway to take patrons to the Center's north and south entrances. In the middle of the Red River walkway is the west entrance to the Erwin Center. The walkway along Red River Street serves as the access way to these three Erwin Center entrances.

The exact location on the walkway where Brister was leafleting and officer Marquez confronted him was under the awning of the Red River entrance, within two feet of the Red River doors. At that point, the brown stone pavement runs from the street into the alcove and up to the Red River doors. The sole purpose served by this entryway is to promote entry to and exit from the facility. This entryway does not serve "to facilitate the daily commerce and life of the neighborhood" as does the normal city sidewalk.

The University Board of Regents has declared that the purpose served by its facilities is a limited one. The Regents provide: "Designation as a Special Use Facility shall not constitute the facility a public facility or forum that is open to use by individuals, groups, associations, or corporations on a first come, first served basis." Also, "[t]he property, buildings, and facilities owned or controlled by the U.T. System or component institutions are not open for assembly, speech, or other activities as are the public streets, sidewalks, and parks."

There is no public sidewalk in front of the Red River entrance precisely because the university built a recessed parking area to permit fast and convenient access for buses and other vehicles. Rather than promoting the flow of pedestrian traffic around the perimeter of the Erwin Center, the recessed parking area necessarily and intentionally inhibits it. It simply cannot rationally be argued that the university created any part of the parking area and walkway leading to the Red River entrance of the Erwin Center for communicative or expressive purposes. The university certainly did not design and build a high-volume entrance for the Erwin Center to force patrons to run a gauntlet of protesters and leafleters. Speakers are permitted full use of public-forum areas, but they should not be privileged to use a high-traffic area not preserved for expressive purposes, especially when the city and the university deliberately declined to create a traditional public forum, *i.e.*, public sidewalk, as a direct result of the plan to create a high-volume entrance.

The Fifth Circuit's physical-characteristics-only analysis unfairly denies the university control over its grounds based solely on the characteristics of surrounding property. To retain the ability to fully control the use of its property, the university must now architecturally distinguish its property from that of adjoining property owners who would create a public forum, perhaps with unsightly fences or warning signs. While barbed-wire fences are

not out of place in the surrounding Texas Hill Country, they are not what the Regents had in mind for their Mediterranean-style campus. Erecting barriers between the university and the surrounding city is not in the aesthetic interest of either and is not in the interest of the larger educational mission of the university.

The Fifth Circuit's test improperly declares the existence of a public forum without any evaluation of whether the owner of the property intended to open the property to public expression. To the contrary, the scope of the university's control over its property is subject to the architectural whim of the City of Austin. Should the City choose to develop public forum property like parks or sidewalks adjacent to the university so that they look the same and are not clearly separated from the university's property, then the adjacent university grounds may become a public forum, even though the university has done nothing to its own property.[1]

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1. Nothing in the Fifth Circuit's analysis necessarily limits the scope of its holding to publicly owned property. Even private property owners could lose control over their property because of a nearby public forum. *See Freedom from Religion*, 203 F.3d, at 494-95 (holding that privately owned property was a traditional public forum).

CONCLUSION

The Fifth Circuit's decision in this case implicates an important and unsettled area of First Amendment law. This Court should grant this petition to resolve this critical issue of federal constitutional jurisprudence.

Respectfully submitted,

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APPENDIX A

Robert BRISTER, et al.
v.
Larry FAULKNER, et al.

No. 99-50254.

United States Court of Appeals,
Fifth Circuit.

June 28, 2000.

Appeal from the United States District Court for the Western District of Texas.

Before POLITZ, SMITH and DENNIS, Circuit Judges. JERRY E. SMITH, Circuit Judge:

Plaintiffs were handing out leaflets before an on-campus event at the University of Texas at Austin's Frank C. Erwin Jr. Special Events Center (the "Erwin Center") when they were forced to leave the property because they were interfering with the arrival and departure of the facility's patrons. They sued university officials under 42 U.S.C. § 1983, seeking damages, declaratory relief, and an injunction against future First Amendment violations.

The district court entered a declaratory judgment that the property in question is a "public forum," because it is indistinguishable from the city sidewalks; therefore, the court held that the university's total ban on leafleting by non-students was not a reasonable time, place, or manner restriction and is unconstitutional. Because it determined that these plaintiffs were impermissibly blocking patrons' access to the facility, however, the court ruled that the university's officers were justified in requiring plaintiffs to move from the property. Thus, the court held that the university did not violate the plaintiffs' constitutional rights, and, consequently, that they were not entitled to damages or injunctive relief.

Accordingly, the court also denied attorneys' fees.

The defendants appeal, challenging the determination that the property is a public forum. The plaintiffs cross-appeal the denial of nominal damages, injunctive relief, and attorneys' fees. Finding no reversible error, we affirm.

I.

The Erwin Center was designed and is maintained for use by the public for the benefit of the university. The center hosts a wide variety of academic, athletic, and auxiliary events each year. Tickets to these events are sold by the university to the general public, and events are sponsored by university organizations and by groups not affiliated with the university.

The Erwin Center is surrounded on all sides by public streets: Martin Luther King, Jr., Boulevard on the north, Fifteenth Street on the south, Interstate 35 on the east, and Red River Street on the west. The City of Austin owns a nine- to twelve-foot easement along each of the center's four sides that serve as the city's public sidewalks. A portion of the university's property on the center's Red River Street side consists of a brown gravel area paved with small stones that extends from the center's public entrance out to the sidewalk. This property blends in with the city's sidewalks, and there is no physical demarcation indicating where university property ends and the city's easement begins.

In January 1996, the Austin Chamber of Commerce hosted a reception at the Erwin Center for the delegates to the National Issues Convention. Members of the Austin Greens political party, including plaintiffs Brister, Baker, Samson, and Medaille, attempted to distribute leaflets to the delegates as they entered the Erwin Center on the Red River Street side. Only Samson and Medaille were University of Texas students. Some of the convention delegates approached the center by walking along the sidewalk and paved area, while others were transported to the center by buses that had pulled into the center's parking lot, located on a recessed area cut into the paved portion of the property.

After receiving numerous complaints about the leafleters, Officer Pascual Marquez, a university police officer, approached Brister while he was distributing leaflets on the paved area, and informed him of the school's policy against non-students' distribution of literature on university property. Marquez also explained that the paved recessed area belonged to the university, whereas the sidewalk belonged to the City of Austin, and told Brister he had to remain south of UT's recessed area. Brister continued to leaflet on the paved area and, after another confrontation with Marquez, returned to the south of the university property and joined other Austin Greens members who were displaying a banner.

Medaille also was approached by a university police officer (not Marquez) and was told that he could not distribute leaflets on the paved area. Medaille identified himself as a University of Texas student but nonetheless was prohibited from distributing the leaflets, because they did not contain his name or the name of a student organization, as required by university rules. The district court found that other than Brister and Medaille, none of the leafleters were approached by the school's police.

II.

Plaintiffs sued Larry Faulkner, President of the University of Texas at Austin; its Vice-President for Administrative Affairs; and the members of the University of Texas System Board of Regents, all in their official capacities, under § 1983, for prospective relief, claiming their First Amendment rights to free speech and assembly were infringed by the policy prohibiting non-students from distributing leaflets and other literature on university property. Also under § 1983, plaintiffs sought damages from Buzz Huber, Events Manager for the Erwin Center; and Marquez and Lieutenant Robert Ewan of the university's police department, in their individual and official capacities.[1]

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[1]Additionally, the plaintiffs challenged the University's rules as applied to the West Mall area of the main campus, which arose out of an April 1996 incident in which Brister similarly attempted to distribute leaflets.

The district court dismissed the claims against Huber and Ewan but otherwise denied summary judgment for defendants. After a one-day bench trial, the court concluded that the university's rules are unconstitutional as applied to the paved area along Red River Street, because that area is a traditional public forum for First Amendment purposes. The court further held, however, that the plaintiffs had suffered no cognizable constitutional injury, because their activities disrupted the delegates and impeded access to the Erwin Center and, thus, the officers' actions were reasonable.

III.

The university[2] contends that because the court found that the plaintiffs had suffered no constitutional injury regardless of whether the paved area outside the Erwin Center is a traditional public forum or a non- public forum, the court rendered an improper advisory opinion in characterizing the nature of the forum. In support of its claim, the university points to the district court's decision on plaintiffs' motion to amend the judgment, in which it stated: "Even if the Court's order [holding that paved area is a traditional public forum] had been in effect it would not have required the defendants to alter their behavior toward the plaintiffs.... The plaintiffs failed to prove any actual, compensatory injuries or obtain any injunctive relief." The university asserts that the court's ruling on plaintiffs' injuries mooted the forum question and thus deprived the court of jurisdiction over that issue.

The plaintiffs claim, in response, that the court rendered a valid declaratory judgment, because each of the plaintiffs presented a viable controversy: Each attempted to distribute leaflets and was ordered to

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The district court held that this area was a non-public forum as applied to the general public and that UT's regulations were reasonable content neutral restrictions. That ruling has not been appealed.

[2]Although the defendants are natural persons, we sometimes refer to them, for simplicity, as "the university."

stop by police, and each was threatened with arrest if he continued his activities. Further, plaintiffs argue that the failure of the district court to award all the relief requested does not render its judgment on the public forum issue merely advisory.

The university's position is without merit. Although the district court stated several times that the plaintiffs' constitutional rights were not violated and that they failed to prove any actual, compensatory injuries sufficient for injunctive relief, those facts did not deprive the district court of jurisdiction to award declaratory relief.

In *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974), the Court was presented with a challenge to the justiciability of a declaratory judgment action where the plaintiff had not yet been charged with any crime under the relevant state criminal trespass statute. The plaintiff sought declaratory relief, claiming that application of that law would violate his First and Fourteenth Amendment rights to distribute handbills at a shopping center. The Court held that the case presented an "actual controversy," that federal declaratory relief is not precluded when a prosecution based on an assertedly unconstitutional state statute has been threatened, but is not pending, and that the plaintiff's failure to demonstrate irreparable injury and to obtain injunctive relief does not preclude declaratory relief.

Significantly, the petitioner had "been twice warned to stop handbilling that he claims is constitutionally protected and [had] been told by the police that if he again handbill[ed] at the shopping center and disobey[ed] a warning to stop he [would] likely be prosecuted." *Id.* at 459, 94 S.Ct. 1209. The Court reasoned that "it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Id.*[3] In addition to its concerns about unnecessarily exposing citizens to criminal sanctions, the Court discussed the unique

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[3]See also *KVUE, Inc. v. Moore*, 709 F.2d 922, 928 & n. 3 (5th Cir.1983) (quoting Steffel).

nature of declaratory relief:

> [E]ngrafting upon the Declaratory Judgment Act a requirement that all of the traditional equitable prerequisites to the issuance of an injunction be satisfied before the issuance of a declaratory judgment is considered would defy Congress' intent to make declaratory relief available in cases where an injunction would be inappropriate.... Thus, the Court of Appeals was in error when it ruled that a failure to demonstrate irreparable injury--a traditional prerequisite to injunctive relief, having no equivalent in the law of declaratory judgments--precluded the granting of declaratory relief. The only occasions where this Court has disregarded these "different considerations" and found that preclusion of injunctive relief inevitably led to a denial of declaratory relief have been cases in which principles of federalism militated altogether against federal intervention in a class of adjudications. *Id.* at 471-72, 94 S.Ct. 1209.

Similarly, in *International Soc'y for Krishna Consciousness v. Eaves*, 601 F.2d 809 (5th Cir.1979), we held that a religious organization's anticipatory challenge to a municipal ordinance regulating the distribution of literature and solicitation of funds at a city-owned airport was a justiciable actual controversy. We noted that "the premise of Marbury v. Madison requires us to insist that an anticipatory challenge to a statute's constitutionality grow out of a 'real, substantial controversy between parties ... a dispute definite and concrete.' " *Id.* at 817 (citations omitted). Thus, to determine whether there was a "definite and concrete" dispute, we asked "whether the plaintiff is seriously interested in disobeying ... the challenged measure." *Id.* at 818. And we summarized the actual-controversy requirement with respect to anticipatory challenges in the following terms: "We can be most certain that a constitutional challenge grows out of a genuine dispute and is not a contrivance prompted solely by a desire to enforce constitutional rights if we know that the allegedly unconstitutional statute interferes with the way the plaintiff would normally conduct his affairs." *Id.* at 819.

There can be no doubt that plaintiffs were seriously interested in

disobeying the university's policy prohibiting non-students from distributing leaflets on campus. Indeed, like the petitioner in *Steffel*, several of the plaintiffs had been approached more than once by Marquez and other officers and had been threatened with arrest if they did not move to the public sidewalks away from the entrance to the Erwin Center. Although plaintiffs are not challenging the constitutionality of a criminal statute per se, the university's policy, if upheld, would allow its police to arrest the leafleters under a criminal- trespass theory. Accordingly, there is no distinction between the conundrum faced by the individuals in *Steffel* and *Eaves*, on the one hand, and the dilemma faced by the instant plaintiffs--either they risked being criminally punished by engaging in "conduct which [they] may have honestly thought was constitutionally protected," or, else, they would be deterred from "engaging in protected activity and enforcing constitutional rights." *Eaves*, 601 F.2d at 821.

In no way are plaintiffs' "threats of prosecution ... imaginary, speculative or chimerical": The officers were fully prepared to arrest the protesters if they did not comply with the officers' instructions. Thus, plaintiffs have demonstrated the existence of an Article III controversy. *See High Ol' Times, Inc. v. Busbee*, 621 F.2d 135, 139 (5th Cir.1980). *Steffel* teaches that it is irrelevant whether plaintiffs were successful in obtaining monetary or injunctive awards and that, instead, declaratory judgment relief is a proper way for individuals to proceed to ensure that their constitutional rights are protected.

IV.

On the merits of the forum issue, the university challenges the district court's conclusion that this particular university property-- outside the Erwin Center, between the public entrance and Red River Street--is indistinguishable from the Austin city sidewalks and, for that reason, is a traditional public forum. "The Court has identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998) (internal quotations and punctuation omitted). Traditional public fora "are defined by the objective characteristics of the property, such as

whether, 'by long tradition or by government fiat,' the property has been 'devoted to assembly and debate.' " *Id.* (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)). Thus, the district court correctly observed that public sidewalks are, by long tradition, public fora.[4]

In determining that the university's paved area adjacent to the Austin sidewalk is a public forum, the district court relied primarily on *United States v. Grace*, 461 U.S. 171, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983), holding that a statute prohibiting displaying "in the Supreme Court building, or on its grounds, any flag, banner, or device designed to bring into public notice any party, organization, or movement," was an unreasonable place restriction on the exercise of free speech and was unconstitutional. Particularly troubling to the Court was the fact that the statute's ban applied to the public sidewalks surrounding the Court building, because sidewalks are traditional public fora. *See Id.* at 178-79, 103 S.Ct. 1702. The Court did not opine on whether the statute was unconstitutional as applied to the building and grounds inside the sidewalks, however, but instead relied on its observation that "the sidewalks comprising the outer boundaries of the Court grounds are indistinguishable from any other sidewalks in Washington, D.C., and we can discern no reason why they should be treated any differently." *Id.* at 179, 103 S.Ct. 1702.

Grace, then, frames the terms of the dispute. On the one hand, the university seeks to distinguish the holding that the statute was unconstitutional as applied to the public sidewalks. It argues that the district court incorrectly presupposed the outcome-determinative conclusion-- i.e., it relied on *Grace* to establish that the university's grounds were themselves a public sidewalk and, therefore, a public forum.

The university is in fact correct that *Grace* is not a perfect fit for that

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[4] The university does not challenge the conclusion that Austin's sidewalks are public fora.

conclusion, because there the Court compared the sidewalks in question to "any other sidewalks in Washington, D.C." Notably, the Court did not compare those sidewalks to the internal grounds of the Court building; indeed, the Court expressly refused to make any judgment as to the building and grounds inside the sidewalks. *See Id.* at 178-79, 103 S.Ct. 1702. Thus, the university relies on the general rule that "[a] university differs in significant respects from public forums such as streets or parks or even municipal theaters." See *Widmar v. Vincent*, 454 U.S. 263, 268, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981).

On the other hand, plaintiffs argue that *Grace* still supports the district court's conclusion that the Erwin Center's grounds that are adjacent to the Red River Street sidewalk are a public forum. They point to the Court's concern that "[t]here is no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some special type of enclave." *Grace*, 461 U.S. at 180, 103 S.Ct. 1702.

Likewise, here there is no indication or physical demarcation of the public sidewalk, which is a public forum, and the university grounds, which typically are not. The university challenges this assertion, however, arguing that its police officers provide verbal warnings sufficient to establish a reasonable boundary line. It points to the undisputed facts in the instant case that demonstrate that Marquez and the other officers repeatedly informed the plaintiffs of when they impermissibly had crossed onto university property.

But these verbal warnings are not sufficient. First, the facts of *Grace* undermine the university's claim that repeated warnings can suffice to establish a boundary between public and non-public fora. The petitioners there had been threatened with arrest several different times while they were protesting on the public sidewalks bordering the Court building, and each time they left without an incident. Thus, they plainly knew that the statute prohibited demonstrations on these particular sidewalks outside the Court, but, nevertheless, the Court held that there was nothing to distinguish these sidewalks from any other sidewalks in the District of Columbia.

The university seeks to distinguish this fact as well, and it correctly observes that *Grace* "does not address the question of whether an oral warning would serve as a sufficient 'indication' of the boundary between the sidewalk and the plaza--or, indeed, whether any 'physical demarcation' is required at that point at all." It argues that the Austin public sidewalk cannot reasonably be thought to extend all the way from the curb to the base of the building, and it warns that the definition of constitutional public fora should not turn on the architectural characteristics of individual buildings. In other words, if the university had not chosen to pave the Erwin Center's grounds with the same brown stones as those used for the public sidewalk, there would be little question that the property in question was not a public forum.

Yet the university cannot so easily avoid *Grace 's* reasoning. In addition to its desire to protect the traditional public fora, the Court was concerned with the adequacy of the notice provided to those who reasonably thought they were on public grounds. This is evident from the Court's prolonged discussion of the lack of any indication or dividing line that would inform a protester that he had entered some special "enclave" where free speech was not protected. Similarly, here the plaintiffs and other members of the public cannot be certain when they have entered the university's enclave, and notwithstanding the university's concerns about the intricacies of architectural design, First Amendment cases often turn on very particular facts.

While both sides make plausible arguments, and while it could be onerous for the university to have to open up the entire area outside the Erwin Center to public discourse, the concerns with chilling otherwise constitutionally- protected speech are paramount. If individuals are left to guess whether they have crossed some invisible line between a public and non-public forum, and if that line divides two worlds--one in which they are free to engage in free speech, and another in which they can be held criminally liable for that speech--then there can be no doubt that some will be less likely to pursue their constitutional rights, even in the world where their speech would be protected.

Moreover, it is of little consequence that the university's officers first

warn the protesters before they arrest them. The constitutional right to free speech suffers injury when this impermissible amount of doubt is introduced, and when constitutional expression is chilled.

Furthermore, the university's burden is not so overwhelming as it claims. While the district court did hold that the Erwin Center's grounds, between the base of the building and the curb of Red River Street, were a public forum, it nevertheless left the university the option of reasonable time, place, and manner restrictions. Thus, the university still can remove anyone who interferes with the flow of traffic to and from the Erwin Center, thereby ensuring that the university's interests retain some protection.

The district court reached the correct conclusion based on the very specific facts set forth here--i.e., a unique piece of university property that is, for all constitutional purposes, indistinguishable from the Austin city sidewalk. Accordingly, the judgment in that respect is affirmed.[5]

V.

On cross-appeal, plaintiffs present three challenges to the conclusion that they suffered no violation of their constitutional rights. We consider each in turn.

A.

Plaintiffs contend that the court committed clear error in finding that Medaille, Baker, and Samson impeded access to the Erwin Center and otherwise disrupted the delegates.[6] As a result, plaintiffs argue that each should have been awarded nominal damages for prevailing on his

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[5] This holding applies only to the specific property at issue on Red River Street and is not to be interpreted to apply to any other property around the perimeter of the Erwin Center or elsewhere, about which we express no opinion.

[6] Plaintiffs concede that there is contradictory evidence in the record to support the district court's findings of fact with respect to Brister.

constitutional claim.[7] They maintain that the record is wholly devoid of evidence that Baker, Samson, or Medaille ever was in front of the doors to the Erwin Center restricting the delegates' access. With respect to Baker and Samson, the plaintiffs claim the record reflects that once they were instructed to get off the sidewalk and, erroneously, that the university's property encompassed the entire sidewalk area along Red River, they proceeded to hand out pamphlets while standing in the street.

This dispute is primarily factual--whether there was sufficient evidence to support the finding that the plaintiffs impeded patrons' access to the Erwin Center and, therefore, that the officers were justified in requiring them to move pursuant to a reasonable time, place, and manner restriction. If such evidence is in the record, plaintiffs concede that they cannot demonstrate clear error, even if there is contradictory evidence supporting their position. But, plaintiffs argue that there is no evidence that Medaille, Baker, or Samson ever was directly in front of the center's doors or that any of them in some other way blocked delegates from getting inside, because neither Marquez nor any other university officer testified to such fact.

By contrast, the three plaintiffs point to Marquez's testimony that the leafleters, other than Brister, "were not in the immediate area." These plaintiffs assert that the closest testimony supporting the district court's conclusion was Marquez's statement that he "noticed approximately five solicitors with a large banner and passing out leaflets as people exited the buses." But, plaintiffs note that there was no mention that the leafleters were preventing people from getting off the buses, nor did anyone identify the plaintiffs as the particular leafleters Marquez observed.

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[7] See, e.g., *Fyfe v. Curlee*, 902 F.2d 401 (5th Cir.1990); *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir.1983) (plaintiff who prevails on constitutional claim but who otherwise does not suffer any injury is entitled to nominal damages). The plaintiffs also insist that Brister is entitled to nominal damages because he successfully demonstrated that an unconstitutional act occurred, even though his own conduct prevented his suffering any damages.

Thus, plaintiffs contend that they were required to leave the public sidewalk, not the university grounds, despite the fact that they were not impeding anyone's entry into the Erwin Center. If this is so, then, plaintiffs argue that the finding that these three plaintiffs inhibited delegates from entering the center is clearly erroneous, and, therefore, that the finding that their constitutional rights were not violated should be reversed, for the reason that this factual finding formed the only basis for the court's legal conclusion.

The university responds by noting that the court simply discounted these plaintiffs' self-interested and unbelievable testimony. It contends that the plaintiffs' account should be disbelieved because they admitted that their recollection of events was hazy, and because that account is inconsistent with other facts that are not in dispute. Specifically, the school claims that this account is not consistent with the fact that other demonstrators apparently were allowed to distribute literature within the city's sidewalk, in full view of university police, and that no university personnel attempted to stop them.[8] Also, none of the plaintiffs could identify the officer(s) who allegedly told them that they could not distribute literature even on the sidewalk between the Erwin Center and Red River Street.

Because we are under a clearly erroneous standard of review, we cannot second guess the district court's decision to believe Marquez's testimony over Brister's and to discount the other plaintiffs' statements that they were interfering with no one. Also, there is evidence that Baker and Samson stood in the recessed area of the university property, where

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[8] The university also tries to argue that, even if plaintiffs could prove that university police ordered them not to distribute materials anywhere on the Red River sidewalk, "it is legally inconsequential," because the only area where they wanted to distribute leaflets was the space in front of the Erwin Center's doors. But this claim is unsupported by any evidence and is contrary to the plaintiffs' complaint that they could not leaflet on the sidewalk. Obviously, plaintiffs wanted to leaflet anywhere they could, the closer the better.

the buses were dropping off delegates, and offered leaflets to people as they got off these buses. While it is uncertain whether this leafleting inhibited patrons' access to the Erwin Center, the court could have concluded that this was enough for the officers to ask the plaintiffs to move back to the sidewalk, and it refutes plaintiffs' claim that they restricted their activities to only the sidewalk.

B.

Plaintiffs argue that Medaille, who claimed to have identified himself as a student to an unspecified university police officer, impermissibly was held to a higher standard than were other university students, because the officer asked him to produce documentation that proved he was authorized to leaflet on campus. Medaille correctly points out that, as a student, he is not required to have prior authorization to leaflet on campus.

But, nevertheless, Medaille failed another requirement of university policy, namely, that any leaflet distributed by a student organization identify that organization on the face of the document. Because plaintiffs' pamphlets did not contain any such identification, Medaille's claim is moot.[9]

C.

To challenge the holding that they suffered no violation of their constitutional rights, plaintiffs attack what they call the "phantom time, place and manner restrictions." They argue that the court's finding that the officers were justified in preventing them from distributing leaflets, when that distribution interfered with the flow of visitors to and from the Erwin Center, was erroneous, because the only place and manner that

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[9] Notably, plaintiffs do not present an overbreadth challenge to this aspect of the university's regulations, as they are a reasonable time, place, and manner restriction aimed at ensuring the university can hold student organizations accountable for littering and the like. Unless they can show that Medaille or another student was treated unfairly, then, plaintiffs have no remaining claim.

existed was the university's absolute ban on non-students' distributing of literature on university property. Thus, plaintiffs assert that the university chose not to promulgate time, place, and manner restrictions that would balance its interests against those of persons wishing to exercise their constitutional rights.

But, in their brief, plaintiffs expressly abandon any void-for-vagueness argument, and, as a result, we cannot see what they hope to accomplish. They have not shown, or even argued, that the ban on leafleting during these events would be an unreasonable restriction were it expressly promulgated, nor have they argued that the university discriminated against them on the basis of the content of their message.

Perhaps plaintiffs are trying to contend that the "phantom" restrictions are not narrowly tailored to serve a legitimate government interest. But the district court has already struck down the only restrictions that are codified, at least with respect to this property, and the university correctly points out that it did not have a more narrow time, place, or manner restriction to evaluate because, until the district court's decision in the instant case, the university did not consider the grounds to be a public forum.

Thus, plaintiffs have not developed their argument here, and they have identified no reversible error. Therefore, we affirm the district court's ruling that plaintiffs suffered no violation of constitutional rights.

VI.

Plaintiffs aver that the court erred in denying them nominal damages. Part of their reasoning is based on their contention, rejected above, that we should reverse the district court's determination that their constitutional rights were not violated. But plaintiffs also argue that regardless of the ruling that they sustained no actual injuries, the court still should have awarded them nominal damages.

Plaintiffs cite cases such as *Russell v. Harrison*, 736 F.2d 283, 291 (5th Cir.1984), in which we noted that "if upon remand, the district court finds a denial of procedural due process, actual damages may be awarded

under 42 U.S.C. § 1983, and nominal damages are appropriate in the event that no actual damages are shown." Plaintiffs also reason that "[b]y making deprivation of such [constitutional] rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed." *Lewis v. Woods*, 848 F.2d 649, 651 (5th Cir.1988) (quoting *Carey v. Piphus*, 435 U.S. 247, 266, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978)).

These authorities do not support plaintiffs' contention that they are entitled to nominal damages, however, because all of them depend on the pre- existing determination that their constitutional rights were violated. That is not the case here, for the district court expressly held that "none of the plaintiffs' constitutional rights were violated because the University police officers, both Marquez who approached Brister and the unidentified officers who approached the other plaintiffs, were justified in requiring the plaintiffs to move away from the Red River doors." Instead, it was the university's policy banning all leafleting by non-students on university property, and not its treatment of the individual plaintiffs, that was unconstitutional.

As a result, the district court fashioned the appropriate relief, a declaratory judgment that the policy would be unconstitutional if applied to the public forum outside the Erwin Center, on the Red River Street side, without proper time, place, or manner restrictions. Nominal damages were neither necessary nor proper in this circumstance, and the court committed no error in refusing them.

VII.

Plaintiffs claim that the district court abused its discretion in denying injunctive relief that would have forced the university to comply with its order. They assert that the university has failed to abide by a prior ruling that held that the same university regulation was unconstitutional for overbreadth. Plaintiffs therefore conclude that the university should not be trusted to comply with the current order.

The prior order, in *Mencio v. University of Tex.*, Civ. Ac. No. A-84-

CA-146 (W.D.Tex., May 19, 1986), provided, in pertinent part, that the policy was "unconstitutional due to its overbreadth," in that it "provide[d] for the absolute prohibition of distribution of leaflets by non-students, faculty and staff." The policy was constitutionally unsound because the university had created a "public forum" at which the First Amendment Rights of non-students could not be abridged.

UT responds by asserting that it has not violated that order, because its reasoning demonstrated--by reference to an earlier ruling in the same case-- that the "public forum" the university had created was time-limited as well as fact-specific:

> In the fact situation presently before the Court, the University has invited several well known individuals to participate in a seminar. The record reflects that the seminar was open to the public and that the public would be invited to verbally participate in the seminar. In light of these circumstances and the applicable case law, it is clear that the University created a "public forum" at this particular place and at this particular time. Consequently, the first amendment rights of non-students would be abridged if they were not allowed to distribute literature along with University students.

In contrast to the circumstances that motivated the prior order, the university points out that the current controversy centers on whether the Erwin Center's grounds are a traditional public forum, not on whether the university created a "designated public forum" by inviting individuals to attend any events.[10] Consequently, the university reasonably thought that its ban on non-student leafleting did not apply to the Erwin Center grounds, because if it were not a traditional public forum (and no court had previously held that it was), it would have been either a non-public forum or not a forum at all. Thus, the district court properly determined that no injunction was necessary to ensure future compliance, because

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[10] See, e.g., *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998) (discussing the creation of designated public fora).

there is no merit to plaintiffs' assertion that the university wilfully ignored a court order.

VIII.

Plaintiffs contend they are entitled to attorneys' fees under 42 U.S.C. § 1988 as prevailing parties, because they were awarded declaratory relief on their constitutional claim and because the court's ruling "materially alters" the legal relationship between the parties.[11] It is of no consequence, according to the plaintiffs, that they did not prevail on any of their claims for damages or injunctive relief, because the declaratory judgment in their favor should be sufficient to establish them as a "prevailing party" under *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992).

The university counters that fees are not justified, because the plaintiffs suffered no constitutional injury. While the Court in Farrar liberally construed the term "prevailing party" under § 1988, the Court did contemplate there will be limits on the awards of fees. For instance, it noted that "a judicial pronouncement that the defendant has violated the Constitution, unaccompanied by an enforceable judgment on the merits, does not render the plaintiff a prevailing party." *Id.* at 112, 113 S.Ct. 566. The Court observed that a plaintiff who wins either compensatory or nominal damages is a prevailing party, but this is so because there is necessarily a determination that his constitutional rights have been violated.

Here, as the district court expressly found, plaintiffs' constitutional rights were not violated. Although, they did obtain a declaratory judgment that the policy banning all leafleting by non-students at the Erwin Center was unconstitutional, that judgment did nothing to alter the legal relationship between these parties. That is,

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[11]The plaintiffs' demand for attorneys' fees is also premised on their contention that the district court erroneously denied them nominal damages and injunctive relief. Because we have rejected both of these claims, however, we need not reconsider them here.

plaintiffs still could not leaflet at the time, and in the manner, that they sought. Instead, the judgment put the university on notice that in the future, it could impose only reasonable time, place and manner restrictions on leafleting in this traditional public forum.

Nor are plaintiffs saved by their reliance on *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806 (5th Cir.), cert. granted, -- U.S. --, 120 S.Ct. 494, 145 L.Ed.2d 381 (1999), which they cite for the proposition that a declaration that a policy is unconstitutional is sufficient for entitlement to fees. But the university correctly observes that the court in Santa Fe awarded attorneys' fees because the plaintiffs there "obtained a judgment vindicating the Santa Fe students' important First Amendment Rights in both graduation ceremony and football game contexts." *Id.* at 823. In other words, the court found that the student-led prayer violated other students' constitutional rights to be free from proselytizing at these school-sanctioned events.

Thus, for the same reasons that *Farrar* is inapposite, so is *Santa Fe*-- both involved violations of the plaintiffs' constitutional rights, while the instant case does not. Therefore, the district court did not err in denying attorneys' fees.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ROBERT BRISTER	§	
et al.,	§	
	§	
v.	§	**No. A 97 CA 372 SS**
	§	
	§	
LARRY R. FAULKNER,	§	
et al.	§	

FINDINGS OF FACT and CONCLUSIONS OF LAW

BE IT REMEMBERED that on the 19th day of November 1998 the Court called the above-styled cause for trial, the plaintiffs appeared in person and by representation of counsel, the defendant appeared by designated representative and by representation of counsel, and all parties announced ready for trial. All parties having waived their rights to trial by jury, trial proceeded before the Court. The plaintiffs are four environmental activists who are challenging the constitutionality of the Defendant University of Texas's absolute ban against the distribution of literature on University property by non-students, faculty, or staff ("non-students"). They complain about two specific past instances and seek declaratory, injunctive, and monetary relief. Having considered all of the evidence presented at trial, the oral arguments and written briefs of counsel, and the applicable law, the Court concludes the plaintiffs are not entitled to any monetary or injunctive relief because the University's decision to remove them from the front of the Erwin Center was a reasonable time, place,

and manner restriction and because the West Mall area is not a public forum. Accordingly, the Court enters the following findings and order.

Findings of Fact

Plaintiffs Robert Brister, Roger Baker, Eric Samson, and William Medaille are members of the Austin Greens, a political party. On January 19, 1996, the plaintiffs attempted to distribute a leaflet entitled "World Scientists' Warning to Humanity" to the delegates to the National Issues Convention. The delegates were attending a reception at the Erwin Center being hosted by the Austin Chamber of Commerce. The Erwin Center is surrounded by public streets - Martin Luther King, Jr. Boulevard on the north, Fifteenth Street on the south, Interstate Highway 35 on east, and Red River Street on the west. The Erwin Center, which is separate from the campus area, was designed and is maintained for use by the public for the benefit of the University. The University brings entertainment and cultural events to the Erwin Center and sells tickets to the public.

A brown gravel area paved with small stones runs along the Red River Street Side of the Erwin Center. The width of the paved area varies. For example, directly in front of the Red River doors, where a U.T. Ticket Master window is located, there is a recessed area cut into the paved area where there are parking spaces. The City of Austin owns a nine to twelve foot easement along the Red River Street side of the Erwin Center. There is no physical demarcation to illustrate where the City's easement ends and the University's property line begins. In front of the Red River doors, the University's property extends all the way to the curb of the recessed area because the recessed area takes up the entirety of the City's easement in that area.

Brister arrived outside the Erwin Center between 6:00 and 6:30 p.m. Approximately ten other people were there to leaflet. Some of the delegates were approaching the Red River door by foot along the paved area. Other delegates were arriving in buses that pulled into the recessed area. Brister was moving around the entire paved area in front of the Red River doors and attempting to pass

out his leaflets. Officer Pascual Marquez, who had been a University police officer for twenty-six years, was standing approximately four feet inside the Red River doors maintaining crowd control. Marquez heard some of the delegates complaining about the leafleters. After receiving three or four complaints, Marquez went outside and found Brister directly in front of one of the buses which had pulled into the recessed area. Marquez approached Brister and informed him of the University's policy against non-students distributing leaflets on University property. Brister argued that it was his constitutional right to distribute the leaflets in the paved area because it was a public sidewalk. Marquez informed Brister that the paved area was actually owned by the University, but that the City owned an easement. After telling Brister to move to the south of the recessed area, Marquez went back inside the Erwin Center. After receiving more complaints from the delegates, Marquez went back outside and saw Brister standing directly under the overhang in front of the Red River doors. Again, Marquez informed Brister that he was on University property and asked Brister to go to the south of the recessed area. Brister continued to argue with Marquez and challenge his authority to prevent Brister from leafleting. Marquez threatened to arrest Brister if he continued to leaflet on University property. After returning to his post inside the Erwin Center, Marquez continued to receive complaints about Brister. When Marquez exited the Erwin Center, Brister was standing within two feet of the Red River doors. Marquez grabbed Brister by the arm and walked him about twelve feet away from the doors, out of the way of the entering delegates. Marquez asked Brister for his identification. Initially, Brister refused to do so and Marquez called for back up. When the additional officers arrived, Brister gave Marquez his identification and Marquez called it in to his dispatcher. After determining there were no outstanding arrest warrants for Brister, Marquez returned Brister's identification. [1]

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[1] Although the offense report filled out by Marquez states that Brister was engaged in "solicitation" instead of improper leafleting and only describes the last confrontation with Brister, the Court accepts Marquez's explanation that Marquez failed to include

During this time, some of the leafleters were displaying a banner and standing to the south of the recessed area. Brister joined that group of leafleters and told them he had been threatened with arrest if he continued to leaflet in front of the Red River doors. Plaintiff Baker continued to leaflet in the "gutter" or curb of the recessed area.

Plaintiff Medaille also attempted to distribute leaflets. While standing near the curb, he asked a University police officer, not Marquez, if he could distribute the leaflets and the officer said no. Medaille told the officer he was a student, and the officer asked for his "paperwork." Medaille, who was familiar with the rules about leafleting because he was a student activist, told the officer that no paperwork was needed for students to distribute literature. However, the leaflet Medaille was attempting to distribute did not contain his name or the name of a student organization, as required by the University's rules. Medaille eventually began leafleting to the south of the recessed area.

Other than Brister, who was impeding the delegates as they exited the buses and stood directly in front of the Red River doors, and Medaille, none of the persons distributing leaflets to the north and south of the recessed area were approached by police officers. None of the police officers disturbed the individuals holding a banner to the south of the recessed area.

After the January 19, 1996 incident, Brister made an appointment with Lieutenant Erwin to complain about Marquez's behavior and to challenge the constitutionality of the University's ban against leafleting by non-students. After investigating Brister's complaints, Erwin sent Brister a letter informing Brister of his conclusion that Marquez's actions were justified and that the University's policy was appropriate.

On April 25, 1996, Brister attempted to pass out leaflets on

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the first two confrontations with Brister in his report because the situation did not sufficiently escalate until the third confrontation.

the West Mall during a rally about human rights and environmental violations. The West Mall is an area of campus bounded on the north by the Texas Union and the Flawn Academic Center, on the south by the architecture buildings, on the east by the administration building, and on the west by Guadalupe Street. The entire West Mall area is contained within the borders of the campus. The University has designated the West Mall area a "free speech" zone for students, faculty, and staff. These groups may rally without obtaining prior permission. Generally, students are permitted to distribute written material on the West Mall, as well as other university property, as long as the distribution does not interfere with access to University buildings and the written material contains the name of the student or organization distributing them. Brister's leaflet contained information about a rally Brister was holding the next day. The leaflet did not contain any advertisements or solicit any donations. The rally was happening on the steps of the main building around noon and approximately one hundred people were in attendance. Melinda DeRoeck, a student affairs administrator, approached Brister and asked Brister if he was student. When Brister said no, DeRoeck said he had to leave the campus or be arrested. Brister argued, but eventually left the West Mall area.

Prior to January 19, 1996, Brister distributed leaflets at the Erwin Center without being approached by the University police when President Clinton was speaking. Brister does not remember if he had distributed leaflets on University property on any other occasions. Brister once spoke at a rally on the West Mall, but did not attempt to leaflet and had attended rallies on the West Mall on at least six previous occasions. Brister had previously seen people he believed to be non-students leafleting on the West Mall without being approached by University police or administrators. Medaille testified that he has seen non-student, religious organizations distributing literature on campus.

Lee Smith, the Associate Vice-President for Administrative and Legal Affairs, testified that there are currently 70,000 faculty, students, and staff at the University. There are several museums on campus that are open to the public during business hours. The

public may also use the library during certain hours. There are several restaurants on campus that cater to the students, but the general public is not excluded. The Performing Arts Center and the athletic facilities are open to ticket holders. Smith testified that the Erwin Center is used for official activities, sporting events, talent events contracted for by the University, student groups' events, and special use events. A special use event occurs when an outside entity rents the Erwin Center and invites guests. The Texas Union and the Performing Arts Center are also special use facilities; these buildings are actually located within the campus boundaries, while the Erwin Center is several blocks south of Memorial Stadium and across the street from Brackenridge, a city hospital. The Director of the Erwin Center is a University employee. Between 1993 and 1997, three million people attended events at the Erwin Center. Twice a year on the West Mall, the University sponsors a marketplace at which businesses that target students may come to campus and set up a booth to solicit customers. The businesses must file an application and receive approval from the Dean of Students. During the noon hour, people from the campus activities office and the University police department patrol the West Mall area to detect non-students and enforce the University's ban against the distribution of literature by non-students.

Glen Maloney, the Associate Dean of Students, testified that he knew of one incident when non-students were permitted to distribute leaflets on University property - an animal rights group who had sought prior permission to protest outside the Erwin Center when the circus was performing there.

Conclusions of Law

1. Alleged First Amendment Violation

Although, as a general matter, peaceful picketing and leafleting are expressive activities involving speech protected by the First Amendment, the Supreme Court has "regularly rejected the assertion that people who wish to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." *United States v. Grace,* 103 S. Ct. 1702, 1706-07 (1983); see also *Cornelius v. NAACP Legal Defense &*

Educ. Fund, 105 S. Ct. 3439, 3447 (1985) ("Nothing in the constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be cause by the speaker's activities."). The government, "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *See Greer v. Spock,* 96 S. Ct. 1211, 1217 (1976). The constitutionality of restrictions on speech depend on whether they apply to a traditional public forum, a designated public forum, or a non-public forum. *See Arkansas Educ. Television Comm'n Forbes,* 118 S. Ct. 1633, 1641 (1998). Streets, sidewalks, and parks, which are historically associated with the free exercise of expressive activities, are generally considered public forums.[2] *See Grace,* 103 S. Ct. at 1707; *See also Hague v.* CIO, 307 U.S. 496, 515 (1939) (explaining that streets, sidewalks, and parks have "immemorially been held in trust for the use of the public and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions").

The government creates designated public forums by "intentionally opening a nontraditional public forum for public discourse." *Forbes,* 118 S. Ct. at 1641 (explaining that the government's inaction or merely allowing limited discourse is insufficient to create a designated public forum). The mere fact that publicly owned or operated property is generally open to members of the public does not render the property a public forum. *See Grace,* 103 S. Ct. at 1707 (explaining this is only one factor in determining whether the government has opened its property for communicative purposes generally). When determining whether an

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[2] Generally, courts determine whether an area is a public forum by considering the objective characteristics of the property, such as whether "by long tradition or by government fiat, the property has been devoted to assembly and debate." *Forbes,* 118 S. Ct. at 1641 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 103 S. Ct. 948, 954 (1983) (internal quotations omitted)).

area is a designated public forum, courts have considered the government's policies and practices to ascertain whether the government intended to create a public forum in an area not traditionally open to assembly and debate. *See Forbes*, 118 S. Ct. at 1641.

In public forums, whether traditional or designated, the government may only enforce reasonable time, place, and manner restrictions against free speech if the restrictions are content neutral, narrowly tailored to serve a significant public interest, and leave open ample alternative channels of communication. *See Grace*, 103 S. Ct. at 1707. An absolute ban on a particular type of expression must be narrowly drawn to accomplish a compelling governmental interest. *Id.* The Government may restrict access to a non-public forum as long as the restrictions are reasonable and content neutral. *See Forbes*, 118 S. Ct. 1641.

A. The Erwin Center

As previously described, a paved area runs on the west side of the Erwin Center bordering Red River Street. Although some of this paved area is owned by the University, the City owns an easement along the paved area that varies in width from nine to eleven feet. The University argues that only the easement is the "sidewalk" and thus only the easement portion of the paved area is a traditional public forum. The University asks the Court to recognize this fiction despite the fact that there is absolutely no physical demarcation to show where the easement ends and the University's property begins. If the Court were to accept the University's argument, then at some point in front of the Erwin Center the public sidewalk would absolutely disappear because the City made a parking cut-out, previously referred to as the recessed area in the easement. Then people who remained on the property to the east of the recessed area would be trespassing on University property. The Court declines to recognize this nonsensical fiction. The entire paved area that runs along Red River Street, even though part of it is literally owned by the University, is a public sidewalk

for First Amendment purposes.[3]

This conclusion is supported by the United States Supreme Court's decision in *United States v. Grace*. In *Grace*, the Supreme Court held that a statute prohibiting the display of any flag, banner, or device designed to bring notice to any party, organization, or movement, in the United States Supreme Court building and on its grounds violated the First Amendment as it applied to sidewalks surrounding the Court grounds. *Grace*, 103 S.Ct. at 1710.[4] The applicable statute, 40 U.S.C. §13p, included the sidewalks within the definition of the Court grounds. *Id.* at 1708. However, the Court explained that "the sidewalks comprising the outer boundaries of the Court grounds are indistinguishable from any other sidewalks in Washington, D.C., and we can discern no reason why they should be treated any differently." *Id.* (distinguishing *Greer v. Spock*, 96 S. Ct. 1211 1976), which dealt with the streets and sidewalks within an enclosed military reservation). The Court

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[3] It is important to again emphasize the physical location of the Erwin Center in reaching this decision. Although the Erwin Center is located on University property, that location is outside of the perimeter of the University campus. Most of the events hosted by the Erwin Center are open to the public by way of ticket sales. The Erwin Center was built for this purpose–its entire design is meant to facilitate the vast number of people that are invited to come and attend the scheduled events. The Erwin Center is surrounded by public streets, which are bordered by public sidewalks. This unique, geographical location of the Erwin Center requires the conclusion that the paved area running along Red River Street is a public sidewalk for First Amendment purposes. A different analysis would be required if the plaintiffs were attempting to leaflet on the sidewalks found with the interior of the campus.

[4] After determining that the sidewalks were a traditional public forum, the Court determined the regulation was not a valid time, place, and manner restriction because the total ban had an "insufficient nexus with any public interests that may be thought to undergird" the regulation. *Id.* at 1709.

noted that "traditional public forum property occupies a special position in terms of First Amendment protection" and that it does not lose its character merely because it abuts government property that has been dedicated to use other than as a forum for public expression or because the government has included it within the statutory definition of what might be considered a non-public forum parcel of property. *Id.*

In this case, the paved area in front of the Erwin Center is not indistinguishable from any other public sidewalk. The area in front of the Erwin Center is paved with brown, pebble-filled gravel and is demarcated by several large squares. Generally, a public sidewalk is a smooth, grayish cement. However, this distinction does not require a different result because there is no "separation,...fence, [or] indication whatever to persons stepping from the [City's easement] to the [University's property] that they have entered some special type of enclave." *Grace*, 103 S. Ct. at 1708. Because the entire paved portion is uniform and serves the same purpose as a public sidewalk, it is a traditional public forum for the First Amendment purposes. The Court emphasizes that it is the inability to distinguish between where the City's easement, which is literally the public sidewalk, begins and ends that requires the conclusion that the entire paved area is a public forum for First Amendment purposes.

The Supreme Court's holding in *United States v. Kokinda*, 110 S. Ct. 3115 (1990) does not require a contrary result. In *Kokinda*, the Court determined that a Postal Service sidewalk running from the parking lot to the post office entrance was not a public forum because "the postal sidewalk was constructed solely to assist postal patrons to negotiate the space between the parking lot and the front door of the post office, not to facilitate the daily commerce and life of the neighborhood or city". *Id* at 3120. The sidewalk in front of the Erwin Center does not serve such a limited purpose. It is not a private-type walkway that merely assists people entering the Erwin Center. Instead, it serves as a public thoroughfare for those individuals walking north or south along Red River Street.

Because the paved area is a traditional public forum, the University's ban against distribution of literature by non-students does not apply to this area. Generally, protestors like the plaintiffs are permitted to distribute literature in the paved area. However, the University is permitted to impose reasonable time, place, and manner restrictions on the expressive activity taking place in the paved area. In this case, Brister was impeding the delegates' entrance into the Erwin Center. Marquez received several complaints about the leafleters' behavior. He observed Brister standing directly in front of the door of a bus hindering those people who were trying to exit the bus. Despite several conversations with Brister about where would be an appropriate place to leaflet, Brister continued to impede the orderly ingress to the Erwin Center. Because Marquez was justified in removing Brister from the entrance of the Erwin Center and ordering him so move to the south of the recessed area, Brister's constitutional rights were not violated. None of the other plaintiffs have presented evidence of a constitutional violation. Medaille requested permission from an unidentified officer to distribute leaflets and the officer said no after Medaille stated that he did not have any paperwork from the University.[5] However, Medaille did continue distributing leaflets at the curb and in the street itself.

B. West Mall

As previously discussed, the West Mall is an area of campus that the University has designated a "free speech" zone for students, faculty, and staff. Unlike the Erwin Center, which is located outside of and apart from the core campus, the West Mall is an integral part of the campus. The West Mall area is contained within

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[5] As previously discussed, a student who wishes to distribute leaflets does not need any paperwork from the University; however, the student must include his name or the name of the sponsoring student organization on the leaflet itself. Medaille admits that the leaflet he was attempting to distribute did not contain his name or the name of any student organization. Therefore, the officer was justified in declining permission to leaflet.

the confines of the University's property. As to this class of persons - students, faculty, and staff - the West Mall is a designated public forum. *See Texas Review Soc'y v. Cunningham,* 659 F. Supp. 1239, 1244 (W.D. Tex. 1987) (finding that the University had created a public forum on the West Mall for student organizations); *see also Widmar v. Vincent,* 102 S. Ct. 269, 273 n. 5 (recognizing that, as to its students, the campus of a state university has many of the characteristics of a public forum). However, the West Mall is a non-public forum as to the general public because the University has not opened the West Mall to public discourse by the general public. *See United States v. Grace,* 103 S. Ct. 1702, 1707 (1983) (explaining that property is not transformed into a public forum merely because the public is permitted to enter freely and admitted to the buildings during specified hours). Through the Regents' Rules and its own additional regulations, the University has chosen to restrict public access to University property for the purpose of leafleting and other expressive conduct. According to Maloney and Smith, the University's practice is to warn non-students who attempt to distribute literature on campus that their conduct is prohibited and to ask them to leave if they persist in their attempt. Although the University is unable to catch every non-student who distributes literature on campus, the University does make an attempt to enforce its rule. University employees patrol the West Mall area during the noon hour, a high traffic period when many students are passing through the West Mall. There is no evidence that the University enforces its ban in an intentionally selective or discriminatory way. The University's ban is permissible under the Supreme Court's First Amendment jurisprudence. *See, e.g., Forbes,* 118 S. Ct. at 1642 (explaining that "with the exception of traditional public fora, the government retains the choice of whether to designate its property as a forum for specified classes of speakers"); *Hays County Guardian v. supple,* 1969 F. wd 111, 116 (5th Cir. 1992) (recognizing that the government may designate a public forum "only for certain speakers or for the discussion of only certain subjects"). Specifically, the Supreme Court has never required a university to make its facilities equally available to students and non-students alike. *See Widmar,* 102 S. Ct. at 273 n.5 (emphasizing that a university has the power to impose "reasonable regulations" compatible with its educational mission upon the use

of its campus and facilities). As explained in *Forbes*, allowing the government to open areas to certain classes of speakers but not others actually increases the amount of speech on University property. If faced with an all or nothing choice, the University might choose to close the West Mall to all speakers rather than allow every member of the public to speak. *Forbes*, 118 S. Ct. at 1643 (positing that public broadcasters might choose not to air any debates if forced to include every purported candidate).[6]

However, the University has the burden of proving that its regulations of non-public fora are reasonable in light of the purpose of the property and not based on the speaker's viewpoint. *Id.* "The reasonableness of the ...restriction must be assessed in light of the purpose of the forum and all the surrounding circumstances"; the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 105 S. Ct. 3439, 3453 (1985); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 101 S. Ct. 2559, 2566 (1981). The relevant question is whether the University's total ban on non-student speech is reasonable in light of the fact that the West Mall is a designated free speech area for students. Smith explained that the University's mission is to promote education, research, and public service. The education component includes student life issues, such as brining entertainment to campus. According to Smith, the University's interest in prohibiting non-students from leafleting on University property is based on the University's need to control litter, limit solicitation, and control the number of people on the campus. The University would be unable to adequately control the number of people, which raises safety concerns. Additionally, the University is concerned about controlling the noise level in the West Mall area because part of that area is bordered by classrooms. The West Mall area is a major passageway for students seeking access to the stores that run along Guadalupe Street, as well as the dormitories and

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[6] In fact, Smith testified that the University might be forced to close the West Mall to all speakers if the University could not restrict access to only faculty, students, and staff.

Greek houses. Smith testified that the student population is an extremely attractive audience. His office receives calls from people all over the country who want to come on to campus and distribute literature. Because of the logistical constraints, the University does not require identification from every person entering the campus. Instead, the University assumes that all people on campus are there for a legitimate business purpose. However, when people are detected breaking the rules, they are warned and eventually threatened with arrest if they refuse to leave the campus.

The Plaintiffs challenge the University's justification for the ban on two grounds. First, they point out, and the University concedes, that every day many non-students enter the West Mall. From this, they conclude that the mere presence of non-students on the West Mall does not cause management problems. Second, they point out that students can freely distribute leaflets on the West Mall. From this, they conclude that the mere activity of leafleting does not create management problems for the University. The Plaintiffs apparently misunderstand the University's concerns. Although the University concedes that it is not successful in keeping all non-students off campus or preventing them from distributing literature, it does not attempt to enforce its ban. If there were no ban, the University fears, and rightfully so, that the number of non-students who entered campus and attempted to distribute nonsolicitation leaflets would significantly increase. It is this potentially vast increase in the number of leafleters, along with the increased volume of litter, that the University contends if would be unable to adequately and responsibly control. The Court accepts this explanation for the ban and finds it reasonable as it applies to the West Mall area. *See International Soc'y for Krishna Consciousness v. Lee*, 112 S. Ct. 2711, 2714 (1992) (noting the Court has required "some explanation as to why certain speech is inconsistent with the intended use of the forum"); *United States v. Kikinda*, 110 S. Ct. 3115, 3124 (1990) (finding that as long as the government's description of the feared disruption "rings of 'common-sense'" it is sufficient to uphold a regulation under reasonableness review). It is appropriate for the University to be concerned about the disruption that might be caused by absolute open access to everyone wishing to distribute literature on campus.

See Cornelius, 105 S. Ct. at 2447. Considering the number of politically active people in Austin and the number of calls the University receives requesting access, it is not unreasonable for the University to assume that absent the ban a considerable number of people would attempt to utilize the West Mall area to distribute literature. The Court rejects the plaintiffs' contention that the University could control the potential droves with reasonable time, place, and manner restrictions - in fact, the plaintiffs criticize the University to failing to absolutely enforce the ban against non-student leafleting. It is difficult to imagine the logistical nightmare of attempting to enforce a more complicated regulatory system. Accordingly, the University's ban against non-student speech, as it applies to the West Mall area, is upheld.

2. Claim for Damages

It is well-settled that a plaintiff is not entitled to recover compensatory damages based on the mere violation of a constitutional right. *See Carey v. Piphus,* 98 S. Ct. 1042, 1052 (1978) (holding a student may only recover compensatory damages if he proved actual injury caused by the denial of his procedural due process right); *Memphis Community Sch. Dist. v. Stachura,* 106 S. Ct. 2537, 2545 (holding that the "value" or "importance" of a constitutional right is not a permissible element of compensatory damages in § 1983 cases). However, compensatory damages may properly include out-of-pocket expenses, impairment of reputation, personal humiliation, and mental anguish and suffering. *Stachura*, 106 S. Ct. at 2543. The Court finds that none of the plaintiffs' constitutional rights were violated because the University police officers, both Marquez who approached Brister and the unidentified officers who approached the other plaintiffs, were justified in requiring the plaintiffs to move away from the Red River doors. Because the plaintiffs were inhibiting the delegates' entrance into the Erwin Center, the officers' actions were a reasonable place and manner restriction on the plaintiffs expressive activity. The plaintiffs sustained no injury whatsoever. For the plaintiffs, their only success is in demonstrating their entitlement to a declaration that the paved area in front of the Erwin Center along Red River Street is a traditional public forum and the University can not impose its absolute ban against the distribution of literature by

nonstudents, faculty, or staff in that area. The University can only impose reasonable time, place, and manner restrictions in that area. At this time, the Court finds that no injunctive relief is necessary.

In accordance with the foregoing, the Court enters the following orders:

IT IS DECLARED that as to the paved area in front of the Erwin Center, the University's ban against the distribution of literature by non-students in UNCONSTITUTIONAL; because it is a traditional public forum, speech in that area may only be restricted by reasonable time, place, and manner restrictions;

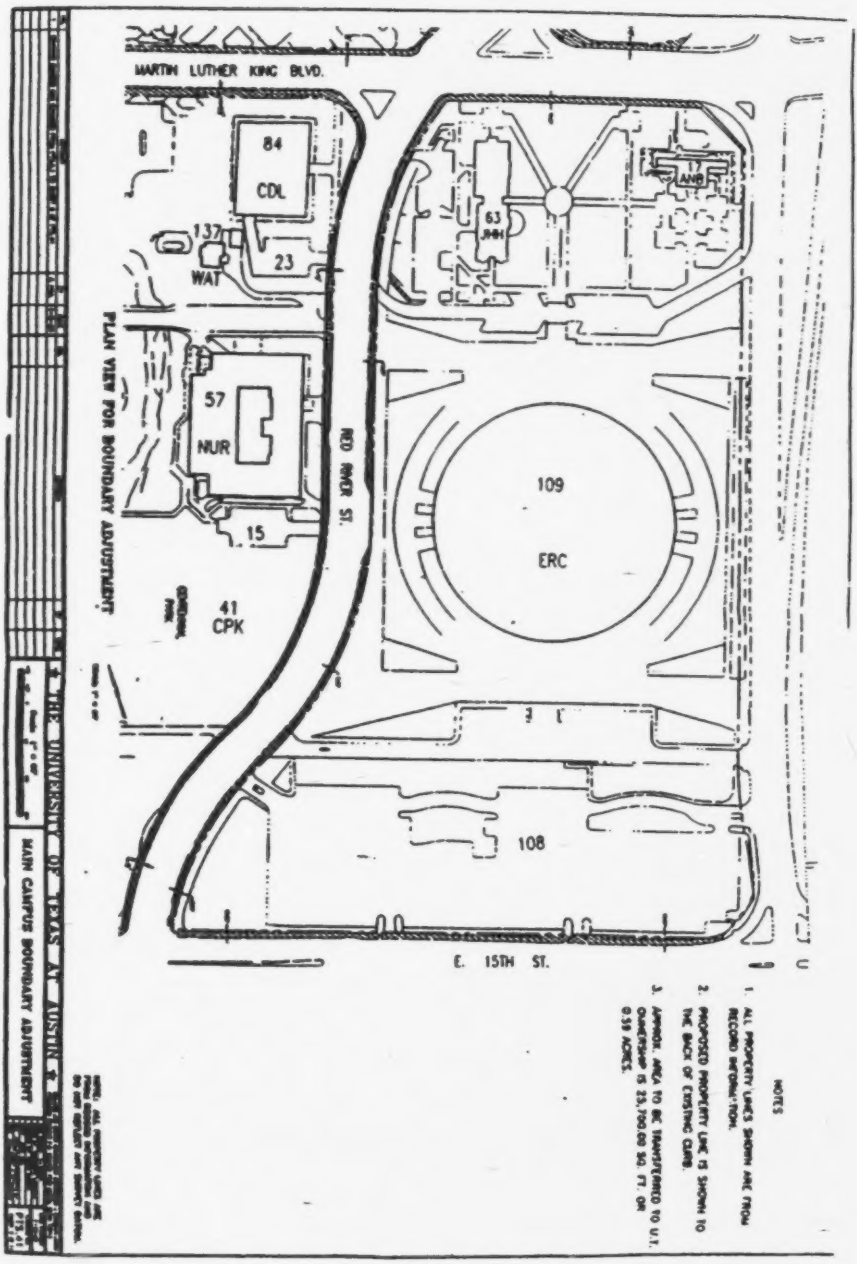
IT IS FURTHER DECLARED that as to the West Mall area, the University's ban against the distribution of literature by non-students in CONSTITUTIONAL;

IT IS FINALLY ORDERED that the plaintiffs constitutional rights have not been violated and any claim for damages is DENIED.

SIGNED this the 28th day of December 1998.

/s/ Sam Sparks
United States District Judge

APPENDIX C



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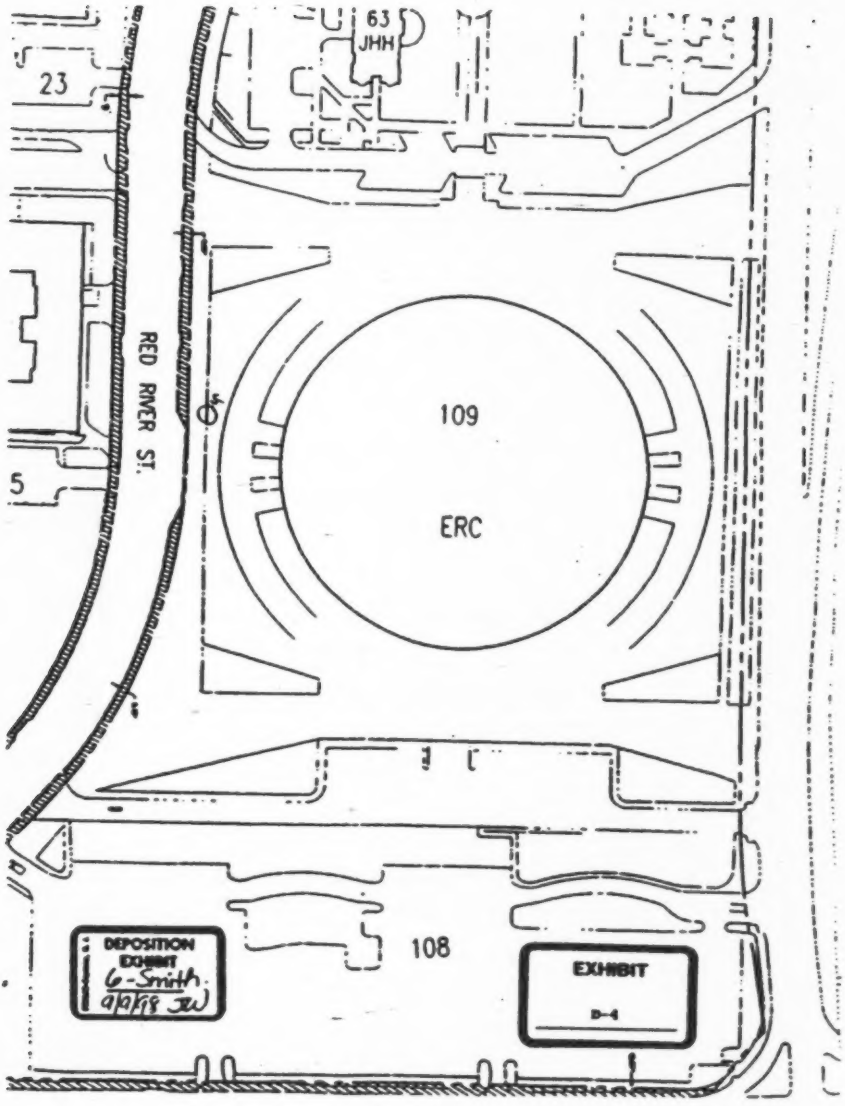
APPENDIX C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Supreme Court, U.S.
FILED
OCT 25 2000
CLERK

(2)

No. 00-485

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

LARRY R. FAULKNER, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF TEXAS, *ET AL.*,

Petitioners,

v.

ROBERT BRISTER, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN COUNCIL ON EDUCATION IN SUPPORT OF PETITIONERS

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October 25, 2000

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QUESTION PRESENTED

Can university property, presumptively a nonpublic forum and declared nonpublic by the university, be deemed a public forum solely because it lies next to and looks similar to an acknowledged public forum?

No. 00-485

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

LARRY R. FAULKNER, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF TEXAS, *ET AL.*,

Petitioners,

v.

ROBERT BRISTER, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONERS

Petitioners have consented to the filing of this brief, by letter dated October 24, 2000. Respondent, however, has refused to grant consent. Pursuant to Supreme Court Rule 37.2(b), therefore, *amicus curiae* American Council On Education (ACE) respectfully moves for leave to file this brief in support of Petitioners in the above-captioned case.

ACE is a non-profit organization that represents approximately 1,800 public and private colleges and universities across the United States, as well as over 175 non-profit education associations and organizations. ACE's

principal purpose is to further the goals of higher education, including the interests of all parts of the academic community: students, faculty, administration, and employees.

ACE has a direct and immediate interest in any issue that affects the administration of public university campuses and facilities. The ruling below could have a significant impact on the ability of administrators at public colleges and universities to create and maintain a safe and tranquil environment for students that is conducive to learning. ACE and its member institutions thus have a keen interest in this case and its potential impact on the quality of education at state-run institutions of higher learning. Because of its intense focus on and concern for higher education nationwide, *amicus* respectfully submits that it offers the Court a perspective distinct from that of Petitioners, and that this brief will be of substantial assistance to the Court as it considers whether this case is of sufficient importance to warrant the Court's attention.

Accordingly, *amicus* requests leave to file the attached brief in support of Petitioners.

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American Council on Education (ACE) is a non-profit organization that represents approximately 1,800 public and private colleges and universities across the United States, as well as over 175 non-profit education associations and organizations. ACE's principal purpose is to further the goals of higher education, including the interests of all parts of the academic community: students, faculty, administration, and employees.

ACE has a direct and immediate interest in any issue that affects the administration of public university campuses and facilities. The ruling below could have a significant impact on the ability of administrators at public colleges and universities to create and maintain a safe and tranquil environment for students that is conducive to learning. ACE and its member institutions thus have a keen interest in this case and its potential impact on the quality of education at state-run institutions of higher learning.[1]

STATEMENT OF THE CASE

The Erwin Center is a 17,000-seat indoor sports arena owned and operated by the University of Texas at Austin. The Erwin Center is the home court for the Texas Longhorns men's and women's basketball teams, it is host to commencement ceremonies and other official functions for the University of Texas, and it is the site of entertainment and cultural events for the University and the surrounding community. Pet. App. at B-6.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief. Although petitioners have consented to the filing of this brief, respondents have not, and *amicus* has therefore included a motion for leave to file pursuant to Supreme Court Rule 37.2(b).

The Erwin Center sits on property owned entirely by the University of Texas. The facility is bounded on all four sides by public streets, and the city of Austin owns an easement that extends on each side from the street curb to the point at which the University's property begins. The city's easement on each side serves as the city sidewalk, which, at any given point, ranges from 9 to 12 feet in width. The University's property begins where the city's sidewalk ends and includes all of the paved area from the city sidewalk to the base of the Erwin Center, as well as the arena itself. The paved area owned by the University of Texas – which extends right up to the public entrances to the building – is identical in appearance to the Austin city sidewalk adjacent to the University's property.

On the evening of January 19, 1996, the Austin Chamber of Commerce hosted a reception for the National Issues Convention at the Erwin Center. That same night, members of the Austin Greens, a local political party, distributed leaflets to guests as they arrived at the Erwin Center. Respondent Robert Brister, a member of the Austin Greens, distributed literature on the Red River Street side of the Erwin Center that night. As the District Court found, Brister "was moving around the entire paved area in front of the Red River doors and attempting to pass out his leaflets." *Id.* at B-2 - B-3. After being asked to move by University police officers, Brister was again found passing out leaflets "directly under the overhang in front of the Red River doors." *Id.* at B-3. The District Court also found that Brister "was impeding the delegates as they exited the buses." *Id.* at B-4. Brister's distribution of leaflets was found by the District Court to have "impede[d] the orderly ingress to the Erwin Center." *Id.* at B-11.

Brister and other members of the Austin Greens brought suit in federal district court alleging that University officials had violated their First Amendment rights. The District Court

entered a declaratory judgment that the university-owned grounds surrounding the Erwin Center are a "traditional public forum" for purposes of the First Amendment and that the University's ban on distribution of literature by non-students was unconstitutional. *Id.* at B-16. The District Court observed that there is no "physical demarcation to show where the [city's] easement ends and the University's property begins," and that, as a result, "[t]he entire paved area that runs along Red River Street, even though part of it is literally owned by the University, is a public sidewalk for First Amendment purposes." *Id.* at B-8 - B-9. Because, in the District Court's view, the Erwin Center grounds were a public forum, the District Court reasoned that the government may only regulate speech "if the restrictions are content neutral, narrowly tailored to serve a significant public interest, and leave open ample alternative channels of communication." *Id.* at B-8. The District Court nevertheless ruled that the University had not violated respondents' First Amendment rights."[b]ecause the plaintiffs were inhibiting the delegates' entrance into the Erwin Center." *Id.* at B-15.

The United States Court of Appeals for the Fifth Circuit affirmed the District Court on both counts. First, the Court of Appeals held that, because "there is no indication of physical demarcation of the public sidewalk, which is a public forum, and the university grounds, which typically are not," Pet. App. at A-9, the Erwin Center grounds are "for all constitutional purposes, indistinguishable from the Austin city sidewalk," and therefore a public forum. *Id.* at A-11. The Court of Appeals also found, however, that there was sufficient evidence in the record to affirm "the district court's ruling that plaintiffs suffered no violation of constitutional rights." *Id.* at A-15. Although the court below held that plaintiffs' constitutional rights had not been violated, the Fifth Circuit specifically noted that the District Court's ruling on the public forum issue was a

discrete declaratory judgment susceptible to appellate review without regard to the court's ultimate ruling on the reasonableness of the state's regulation of plaintiffs' speech. *See id.* at A-4 - A-7. Review by this Court of the "public forum" ruling is therefore appropriate in this case. *See Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 334 (1980).

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's holding that university-owned property outside a major sporting arena is a "public forum" under the First Amendment – simply because it looks similar to a nearby city sidewalk – creates two important conflicts among the courts of appeals that require resolution by this Court. First, the Fifth Circuit (along with the Second Circuit) is irreconcilably in conflict with the Tenth and Third Circuits, which have held that the paths of ingress and egress into and out of theaters and arenas are not public forums. The approach taken by the Tenth and Third Circuits is clearly the correct one under this Court's precedents, and, had the public forum issue been decided in one of those jurisdictions, the result would have come out the opposite way.

Second, the Fifth Circuit (along with other circuits) is squarely in conflict with the Ninth and Eleventh Circuits over the significance of the physical characteristics of property in making the public forum determination. Under the ruling below, physical characteristics are given preeminent status in the public forum analysis, while the purpose and function of the property are not even considered. In the Ninth and Eleventh Circuits, in contrast, mere physical characteristics are not controlling, and those courts focus on the purpose and function of the property in question. Again, had the public forum issue been decided in one of those circuits instead of the Fifth Circuit, the result would have come out the other way.

Finally, *amicus* is particularly concerned about the Fifth Circuit's public forum analysis because it unnecessarily compromises the ability of university administrators to ensure a safe and secure environment for education by strictly limiting their ability to regulate conduct on their campuses. The fact that the Court of Appeals ultimately concluded that the University did not violate Respondents' constitutional rights is of little comfort to *amicus*, whose member organizations now face uncertainty in the extent of their authority to regulate campus life for the benefit of students. For all of these reasons, this Court should grant a writ of certiorari to resolve the conflicts and reverse the decision below.

I. THE CIRCUITS ARE IN CONFLICT OVER APPLICATION OF THE "PUBLIC FORUM" DOCTRINE.

A. Framework Of The Public Forum Doctrine.

Under this Court's jurisprudence, the first step in a First Amendment analysis is to determine the type of forum in which the speaker wishes to speak. "The Court has identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Arkansas Educ. Tele. Comm'n v. Forbes*, 523 U.S. 666, 677 (1998). The amount of protection to which speech is entitled depends on which of these three fora is at issue. *See Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 800 (1985).

A traditional public forum is one, like a public sidewalk or park, which "'by long tradition or by government fiat,' . . . has been 'devoted to assembly and debate.'" *Forbes*, 523 U.S. at 677 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). A designated public forum is one that is "created by government designation of a place or channel of communication for use by the public at large for

assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Cornelius*, 473 U.S. at 802. All other government properties are either nonpublic fora or not fora at all. *See Forbes*, 523 U.S. at 677.

The public forum receives the highest degree of protection under the Court's jurisprudence. "Speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius*, 473 U.S. at 800. The government's ability to restrict speech in a designated public forum is similarly limited: "[r]egulation of such property is subject to the same limitations as that governing a traditional public forum." *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992). The rule governing regulation of speech in a non-public forum is the least restrictive of the three. Indeed, "[l]imitations on expressive activity conducted on this last category of property must survive only a much more limited review. The challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *Id.* at 678-79. Given the dramatically different level of review that is applied to public forums versus non-public forums, the determination of forum type at the outset of the analysis is of critical importance to the outcome of each case.

B. The Circuits Are In Conflict Over Whether Arena Entryways Qualify As "Public Forums" Under The First Amendment.

The Fifth Circuit held below that the paved area outside the Erwin Center, including the grounds extending up to "the Center's public entrance," are a "public forum" for purposes of the First Amendment. Pet. App. at A-2. As the District Court acknowledged, the property held to be a public forum in this case includes the area "directly in front of the . . . doors" to the

arena. *Id.* at B-4. Consistent with the public forum holding below, the Second Circuit has also held that the "sidewalks and mall areas outside" of New York's Nassau Coliseum (home of the New York Islanders) are a public forum. *Paulsen v. County of Nassau*, 925 F.2d 65, 69, 71 (2d Cir. 1991). In reaching the same conclusion, the Second Circuit also expressly found what the Fifth Circuit implicitly decided below: "crowd control [and] safety . . . do not mandate a different result." *Id.* at 71.

In direct conflict with the Fifth Circuit and the Second Circuit, other circuits have rejected the proposition that public property dedicated to the ingress and egress of guests into and out of a major facility like the Erwin Center can be a traditional public forum under the First Amendment. For example, the Tenth Circuit has ruled that the Galleria in Denver is a non-public forum on the ground that "the Galleria's function is simply to permit ingress to and egress from the . . . various complexes" of the Denver Performing Arts Complex. *Hawkins v. City and County of Denver*, 170 F.3d 1281, 1287 (10th Cir. 1999). Like the area outside the Erwin Center, the Galleria "serves as the exclusive means of ingress to and egress from . . . events taking place in the adjacent performing arts complexes," and "in effect serve[s] as an extended lobby for the various performing arts venues." *Id.* at 1284. In the Tenth Circuit, a walkway that performs these functions is a non-public forum; in the Fifth and Second Circuits, identical property serving an identical function is a public forum. This is a direct conflict that should be resolved by this Court.

The Fifth Circuit's decision is also in direct conflict with the Third Circuit's decision in *International Soc'y for Krishna Consciousness v. New Jersey Sports and Exposition Authority*, 691 F.2d 155 (3d Cir. 1982) ("*ISKCON*"). In *ISKCON*, the Third Circuit held that the Meadowlands

complex in New Jersey (home of Giants Stadium and Meadowlands race track), including "the two structures and their surrounding areas," are "not a public forum." *Id.* at 158, 162. The court there reasoned that "[t]he Meadowlands complex does not fit any of the accepted descriptions of a public forum," and noted that "stadiums are the kind of public places described . . . as being 'so clearly dedicated to recreational use that talk of their use as a public forum would in general be totally unpersuasive.'" *Id.* at 161 n.3 (citation omitted); *see also Hubbard Broadcasting Inc. v. Metropolitan Sports Facilities Comm'n*, 797 F.2d 552, 555 (8th Cir.) (concluding that the Minneapolis Metrodome "does not come within the scope of the traditional public forum"), *cert. denied*, 479 U.S. 986 (1986). Moreover, the Third Circuit recognized that the state has a significant interest in "maintaining traffic and crowd control" at such facilities and that it is "essential that people move rapidly and with a minimum of interruptions as they stream through the parking lot and stadium." *ISKCON*, 691 F.2d at 162. Again, the outcome of the public forum issue in this case would be different had it been decided by the Third Circuit.[2]

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[2] Indeed, a district court in the Third Circuit applied *ISKCON* as recently as this year to conclude that university facilities and the areas immediately surrounding them are not public forums. *See Sabatini v. Reinstein*, No. Civ.A. 99-2393, 2000 WL 1052103 (E.D. Pa. July 21, 2000). In *Sabatini*, plaintiff asserted that his First Amendment rights had been violated when officials at Temple University law school in Philadelphia thwarted his efforts to "distribut[e] leaflets both inside and on the steps of the buildings where . . . graduation exercises were being held." *Id.* at *1. Relying on the Third Circuit's decision in *ISKCON* and this Court's decision in *United States v. Kokinda*, 497 U.S. 720 (1990), the District Court held that the "the buildings and outside steps adjacent to McGonigle Hall and the Apollo building do not qualify as traditional public forums." 2000 WL 1052103 at *2.

The Fifth Circuit and the Second Circuit have held that walkways surrounding and leading into a major arena are a public forum for purposes of the First Amendment – a proposition rejected by their sister circuits. *Amicus* respectfully submits that this is a direct and irreconcilable conflict on a significant question of federal law ripe for resolution by this Court.

C. The Circuits Are Split Over The Significance Of Physical Characteristics In Determining Whether Property Is A Public Forum.

The public forum ruling below also deepens a conflict among the circuits concerning the significance of the "physical characteristics" of property in the public forum analysis. Under the Fifth Circuit's analysis, the mere fact that university property "blends in with the city's sidewalks" renders the university property a public forum for First Amendment purposes. Pet. App. at A-2. Consistent with the Fifth Circuit's approach, the D.C. Circuit has acknowledged that public forum "cases generally focus on physical differentiations rather than on the scale of the area's various uses," and has held the sidewalks surrounding the Vietnam Memorial in Washington, D.C. to be a public forum based on their "apparent similarity" to the other sidewalks in Washington. *Henderson v. Lujan*, 964 F.2d 1179, 1182 (D.C. Cir. 1992). The Fourth Circuit has adopted a similar approach. *See Warren v. Fairfax County*, 196 F.3d 186, 203 (4th Cir. 1999) (Niemeyer, J., dissenting) (criticizing the Fourth Circuit for adopting a public forum analysis that "rel[ies] solely on the physical characteristics" of property).

The approach of the Fourth, Fifth, and D.C. Circuits is in direct conflict with that of the Ninth and Eleventh Circuits. Following this Court's decision in *United States v. Kokinda*, the Ninth Circuit has stated that "the '[m]ere physical characteristics of the property [do not] dictate forum analysis.'"

Jacobsen v. Bonine, 123 F.3d 1272, 1274 (9th Cir. 1997) (quoting *United States v. Kokinda*, 497 U.S. 720, 727 (1990) (plurality opinion)). As the Ninth Circuit explained, "it is the 'location and purpose' of the property and the government's subjective intent in having the property built and maintained, that is crucial for determining the nature of the property for forum analysis." *Id.* (citing *Kokinda*, 497 U.S. at 728-30).

Consistent with the Ninth Circuit, the Eleventh Circuit has echoed that "the mere physical characteristics of the property cannot dictate forum analysis." *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1204 (11th Cir. 1991) (quoting *Kokinda*, 497 U.S. at 727). Like the Ninth Circuit, the Eleventh Circuit has rejected the notion – approved by the Fifth and D.C. Circuits – that "the superficial resemblance between" the property in question and a traditional public forum is central to the First Amendment analysis. That is all the more so, the Eleventh Circuit recognized, where, as here, there is evidence that "the government did not intend to open the forum to the same panoply of activity permitted in the latter fora." *Id.* Like the Ninth Circuit's decision in *Jacobsen*, the Eleventh Circuit's decision in *Sentinel Communications* directly conflicts with the public forum decision below, which conducted no analysis of the purpose and function of the grounds outside the Erwin Center.

Had the court below focused on the purpose and function of the grounds surrounding the Erwin Center – namely to ensure the orderly and safe passage of visitors into and out of the arena – rather than on the "mere physical characteristics" of the property, the Fifth Circuit's public forum determination would have come out the other way. This conflict – over whether the physical appearance of public property is to be given preeminence in forum analysis –

involves an important and unsettled question of constitutional law that should be resolved by this Court.

II. THE DECISION BELOW IMPROPERLY DEPRIVES OFFICIALS AT PUBLIC COLLEGES AND UNIVERSITIES OF A SIGNIFICANT AMOUNT OF CONTROL OVER THEIR CAMPUSES AND FACILITIES.

The decision below, if not reversed, could have a significant negative impact on the ability of public colleges and universities to ensure a safe and secure educational environment for their students. Prior to the lower court's ruling, a public university's property was deemed to be a non-public forum (at least with respect to non-students) unless the university took some steps to designate it as a public forum. This rule made sense, because it afforded university officials a measure of control over their campuses with the goal of ensuring an environment conducive to learning. Now, at least for public colleges and universities, property surrounding university facilities is far more likely to be declared a public forum – subject to the stringent rules for regulating speech in such a forum – whenever a university takes steps to blend its campus in with the surrounding environment.

The Supreme Court has long recognized that campuses at public colleges and universities are different from other public property. As the Court stated in *Widmar v. Vincent*, 454 U.S. 263 (1981),

> A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that

> mission upon the use of its campus and facilities.

Id. at 268 n.5; *see also id.* at 278 (Stevens, J., concurring) (University "facilities are not open to the public in the same way that streets and parks are. University facilities – private or public – are maintained primarily for the benefit of the student body and faculty."). As the Ninth Circuit has recognized, a university "may preserve such tranquility as the facilities' central purpose requires. . . . Not only must a university have the power to foster an atmosphere and conditions in which its educational mission can be carried out, it also has a duty to protect its students by imposing reasonable regulations on the conduct of those who come onto campus." *Souders v. Lucero*, 196 F.3d 1040, 1045 (9th Cir. 1999) (internal citations omitted), *cert. denied*, 120 S. Ct. 1674 (2000).

The presumption that university grounds are a non-public forum serves important educational interests that were ignored by the court below. As this Court has recognized, university property is, first and foremost, dedicated to the mission of educating students. Students attending classes and other university events may now be subjected to leafletters, protesters, people soliciting donations, political supporters, and any other type of speaker as they attempt to enter university buildings. Students, moreover, are an easy target for people seeking to convey a message, since they have no choice but to visit designated buildings at predictable times in order to receive their education. The customary tranquility of the college environment – and the educational goals served by that environment – could thus be jeopardized by the ruling below.

The decision below leaves university administrators powerless to regulate this increased activity on their campuses absent a "compelling" or "significant" state interest. University officials must also now guess whether a regulation is sufficiently "narrowly drawn" to serve the state's compelling

interest, instead of simply satisfying the "reasonableness" test applied in non-public forums. Even if the university guesses correctly and draws a constitutionally permissible regulation, the university is still certain to be subjected to increased litigation and federal court review. The disruptive effect of the ruling below is apparent and, in the end, will only minimally promote First Amendment goals while potentially having a significant negative impact on education at public institutions.

The holding below is also not so limited as the Fifth Circuit suggests. The Erwin Center is typical of arenas at many major public universities. Like the Erwin Center, these arenas must accommodate thousands of individuals for university events, including sporting events and graduations, thus presenting school officials with the significant challenge of controlling large crowds and ensuring the safety and security of visitors. Moreover, the reasoning employed below is broad enough to apply to *any* university facility, not just arenas, and therefore could cause confusion on public school campuses regarding the level of regulation permitted outside campus buildings.

The design of the Erwin Center is also not as unique as the Fifth Circuit suggests. Many public colleges and universities, particularly in urban settings, make an effort to blend their facilities into the surrounding community. The price of such cooperation with the surrounding community under the ruling below is a dramatic loss of control over university property and the safety and security of students in and around university facilities. Surely the First Amendment does not require such a result.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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